81-1617

No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RAYMOND J. PLACE

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from detaining personal luggage reasonably suspected of containing narcotics for the purpose of arranging exposure to a narcotics detection dog.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (App. D, *infra*, 34a-57a) is reported at 498 F. Supp. 1217.

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 30a-31a), was entered on September 16, 1981.

A petition for rehearing was denied on November 30, 1981 (App. C, *infra*, 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (App. E, *infra*, 58a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following the denial of his suppression motion, respondent pled guilty in the United States District Court for the Eastern District of New York to possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to three years' imprisonment. Finding that the temporary detention of respondent's suitcase in order to permit its exposure to a narcotics detection dog violated the Fourth Amendment, the court of appeals reversed.

1. a. The evidence adduced at the suppression hearing is set forth in the opinions of the courts below (App. A, *infra*, 2a-6a; App. D, *infra*, 34a-41a). It showed that on Friday morning, August 17, 1979, two Dade County, Florida, narcotics investigators, Detectives McGavock and Facchiano, on duty at the Miami International Airport were observing passengers standing in line at the National Airlines ticket counter (App. D, *infra*, 34a). Their attention was attracted to respondent, who, while standing in the ticket line, appeared to be nervously scanning the area and closely scrutinizing everyone entering or seated in the lobby (*id.* at 35a). In particular, respondent was observed staring at Detective McGavock

[1] Respondent entered the plea of guilty reserving the right to appeal the denial of the motion to suppress (App. A, *infra*, 2a).

as the officer conferred with Detective Facchiano and moved around the lobby area, although respondent would look away when Detective McGavock looked at him (*ibid.*).

After respondent purchased his ticket with cash and checked two suitcases, Detective Facchiano went to the baggage loading area to examine the identification on the luggage, and Detective McGavock followed respondent. He observed respondent walk toward the concourse gate for his flight and then suddenly return toward the ticket counter and walk a complete circle around the lobby area while continuously looking back over his shoulder (App. D, *infra*, 35a-36a). Respondent then walked toward the concourse gate again, stopping for less than a minute in a restroom. Detective Facchiano then rejoined Detective McGavock after ascertaining that the name on respondent's bags appeared to be Place (*id.* at 36a).

When respondent reached the security gate in the boarding area, Detective Facchiano approached him, displayed his credentials, and, after explaining that there was a serious contraband problem at the airport, asked respondent if he would show the officers some identification and his airline ticket. Respondent began to perspire heavily and handed the detective his ticket and driver's license, which identified him as Raymond Place. Detective Facchiano then asked respondent for consent to examine the contents of the suitcases respondent had checked. Respondent replied that he had no objection. Nevertheless, because respondent's flight bound for New York's LaGuardia Airport was due to depart shortly, the officers decided not to search the luggage and terminated the discussion (see Tr. 28, 74).[2] As respondent proceeded to the

[2] "Tr." refers to the transcript of the suppression hearing.

security gate, he turned and remarked that he had recognized the detectives as police officers when he first saw them in the lobby (App. D, *infra*, 36a-37a).

Detective McGavock then decided to go to the baggage loading area to examine respondent's luggage himself. He noticed that the identification labels on the two suitcases bore different street addresses in Hallandale, Florida. After copying down the addresses and obtaining the call-back telephone number that respondent had given with his reservation, Detective McGavock telephoned the Hallandale police department. They informed him that neither of the street numbers on respondent's suitcases existed and that the telephone number was for a residence at a different address on the same street as the addresses on the baggage tags. Detective McGavock then telephoned DEA Special Agent Gerard Whitmore in New York and informed him of what had transpired, giving him a description of respondent and his luggage (App. D, *infra*, 37a-38a).

b. Agent Whitmore and his partner, Agent Iglesias, recognized respondent as he deplaned upon arrival at LaGuardia Airport. While walking to the baggage area, respondent repeatedly looked behind him, stopping once to look at the persons around him. At the baggage claim area, the agents observed respondent standing just outside the entrance looking at every person in the area. When the luggage arrived, respondent entered and picked up his bags. When Agent Whitmore began to follow respondent down a corridor, respondent abruptly stopped, turned, and stared at the agent (App. D, *infra*, 38a-39a).

After respondent made a telephone call, apparently to a limousine service, the agents approached him and Agent Whitmore identified himself to respondent

as a federal narcotics agent. Respondent immediately remarked, "I knew you guys were cops. I spotted [Agent Iglesias] as soon as I got out of the plane." The agent explained that, based partly on information relayed by the Dade County police, he suspected respondent of carrying narcotics. Respondent was asked whether the suitcases he was carrying were his. He replied that they were and added that a gang of police had surrounded him in the Miami Airport, humiliated him, and searched both his person and his luggage. Agent Whitmore then responded that he had been informed that respondent had not been searched at the Miami Airport, but respondent repeated his assertion that he had been searched. The agent then asked to see respondent's identification and requested permission to examine the contents of the suitcases, explaining that in the absence of consent the luggage could not be searched without a warrant (Tr. 87-88; App. D, *infra*, 39a-40a).

Respondent declined to consent to a search and inquired whether he was under arrest or was free to leave the airport with his luggage. Agent Whitmore told respondent that he was not under arrest and was free to leave, but his luggage would be taken to a federal judge to make a determination as to whether a search warrant should issue. He also informed respondent that he could accompany them on the trip. Respondent declined, however, explaining that he would be unable to do so because of "pressing engagements" (Tr. 89). Agent Whitmore gave respondent a phone number where the agent could be reached at any time so that respondent could arrange for the return of his luggage (Tr. 93), and the agents

loaded the luggage into a car and left the airport (App. D, *infra*, 40a-41a).[3]

The agents then drove with the bags to a Customs Bureau dog handler facility at Kennedy Airport, leaving at about 4:10 p.m. and arriving approximately 35 minutes later (Tr. 96-97). Respondent's bags were placed among other parcels for exposure to the dog and, at approximately 5:30 or 5:40 p.m., the dog signaled the presence of drugs in the smaller bag but reacted ambiguously toward the larger bag. Thereafter, a United States magistrate issued a search warrant for the smaller bag. Agent Whitmore then opened the bag and found 1,125 grams of cocaine, 25 LSD tablets, and a quantity of marijuana (App. D, *infra*, 41a; Tr. 97-101).

2. Prior to trial, respondent moved to suppress the evidence found in the smaller suitcase. The district court denied the motion, rejecting the claim that the temporary detention of the suitcase violated the Fourth Amendment. Relying heavily on *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the court held that reasonable suspicion that luggage contains contraband justifies a limited detention to obtain a dog sniff of the sort involved here (App. D, *infra*, 52a-57a). Finding that the agents' observations and respondent's behavior during questioning "were sufficient to raise in the agents' mind a reasonable suspicion to believe that the bags contained narcotics,"[4]

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[3] Before the agents left, respondent twice approached Agent Whitmore and inquired whether something could be "arrange[d]" or "fix[ed] up" so that he could leave the airport with his luggage (App. D, *infra*, 40a; Tr. 91, 94).

[4] The district court noted that, in its view, the facts known to or observed by the agents were sufficient to constitute probable cause (App. D, *infra*, 57a n.7).

the court concluded that respondent's "Fourth Amendment rights were not violated by the detention of the bags by the DEA Agents" (*id.* at 57a).[5]

3. A divided court of appeals reversed (App. A, *infra*, 1a-29a). The court assumed that the DEA agents' observations of respondent's behavior and the information they obtained from the Dade County detectives justified a reasonable suspicion that he was a drug courier,[6] but it concluded that "the prolonged seizure of [respondent's] baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights" (*id.* at 14a).

The court of appeals first examined decisions of this Court concerning investigatory detentions of persons based on *Terry* v. *Ohio*, 392 U.S. 1 (1968). Relying on *Dunaway* v. *New York*, 442 U.S. 200, 212-213 (1979), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975), the court observed that an

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[5] The court also rejected respondent's arguments that his Fourth Amendment rights were violated by the approaches made to him by the police in both Miami and New York. It held that both encounters were supported by reasonable suspicion that respondent was engaged in unlawful activity and gave a detailed enumeration of the factors that warranted the suspicion in each instance (App. D, *infra*, 47a-52a). The court also rejected respondent's claim that the dog sniff was arranged so as to draw attention to his suitcases and hence was unreliable (*id.* at 57a).

[6] The court of appeals rejected the district court's view that the detention of respondent's luggage was supported by probable cause (App. A, *infra*, 11a-12a). While we do not acquiesce in the correctness of that conclusion, especially in light of respondent's apparent bribe attempt (see note 3, *supra*) and his retreat from his earlier assertion of ownership of the smaller bag (see Tr. 92), we do not ask this Court to review the fact-bound question of the existence of probable cause, but assume for present purposes that the bags were detained on the basis of reasonable suspicion falling short of probable cause.

investigative stop of a suspect "has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found" (App. A, *infra*, 14a). The court then rejected the notion that the standard of reasonableness applicable to the detention of baggage could differ from that applicable to the detention of a person, stating (*id.* at 16a):

> [T]he Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

Proceeding from this premise, the court concluded that, because a detention of respondent's person for the length of time involved here and his removal to a different location for the purpose of determining whether he was carrying narcotics would have violated the Fourth Amendment in the absence of probable cause (*ibid.*), the detention by the police of his luggage in order to bring it to a drug detection dog "cannot reasonably be characterized as a *Terry*-type 'investigative stop'" (*id.* at 18a). Rather, it "amounted to a seizure without probable cause of [respondent's] effects in violation of his Fourth Amendment rights" (*ibid.*).[7]

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[7] The court also stated that the Fourth Amendment violation was exacerbated by the agents' statement that they were taking the bags to a federal judge to get a search warrant when they, in fact, first took them to another airport for exposure to a drug detection dog. Moreover, because the agents

The court further stated that *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), which involved the detention by postal officials for further investigation of mail packages suspected of containing contraband, was of no relevance to this case because the detention in *Van Leeuwen* occurred only after the owner of the parcels had voluntarily deposited them with the Postal Service. The court of appeals concluded that *Van Leeuwen* involved "at most a minimal or technical interference" with an individual's rights as opposed to the "substantial intrusion" involved here (App. A, *infra*, 20a). Accordingly, the court found "unpersuasive" three decisions in other circuits upholding the constitutionality of similar temporary baggage detentions for the purpose of performing a dog sniff test (*id.* at 20a-21a).[8]

Judge Oakes filed a concurring opinion (App. A, *infra*, 22a-23a) in which he asserted his view that seizures based on less than probable cause should be permissible only when made pursuant to "reasonable rules or regulations adopted by the appropriate gov-

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did not specify when the luggage would be returned, the court suggested that respondent could have understood that it would not be returned to him for "weeks." The court characterized this lack of disclosure as "not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment" (App. A, *infra*, 18a-19a).

[8] The court also asserted that those cases were factually distinguishable because it did not appear in them (1) that the duration of the detention was as long as it was here; (2) that the baggage was removed from the airport to another location; (3) that the agents concealed their plans for investigation of the baggage; and (4) that the agents indicated that the baggage detention would be of indefinite duration (App. A, *infra*, 21a).

ernmental authority and subjected to appropriate judicial review" (*id.* at 22a).

Judge Kaufman dissented (App. A, *infra*, 23a-28a), concluding that "the temporary detention of [respondent's] luggage was a reasonable 'stop' within the meaning of *Terry*" (*id.* at 28a). He explained that the Fourth Amendment's prohibition against "unreasonable" searches and seizures requires that "the government interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy" (*id.* at 24a). Here, the "public interest in holding [respondent's] suitcase for a 'sniff test' was compelling—detection of an individual who trafficks in drugs" (*id.* at 24a-25a), and the agents' observations "reveal[ed] such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained [respondent's] bags" (*id.* at 25a). Judge Kaufman emphasized the limited nature of the intrusion in that respondent himself was not detained, nor did the agents invade his privacy interest in the contents of his suitcases prior to securing a warrant (*id.* at 25a-27a). He also stated that the principles of *Van Leeuwen* were fully applicable here and that, contrary to the majority's assertion, the baggage detention cases in other circuits were not distinguishable (*id.* at 27a-28a & n.2).

## REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the restrictions the Fourth Amendment places on police action when there exists reasonable suspicion that an individual's luggage contains contraband. The court of appeals has held that the police may not detain the luggage temporarily for

the purpose of pursuing a specific course of investigation calculated to confirm or dispel that suspicion; rather, the police must allow the individual to leave with his baggage, with the almost certain result that any contraband contained in the baggage will be distributed or destroyed. See App. A, *infra*, 25a (Kaufman, J., dissenting). This decision directly conflicts with the holdings of three other courts of appeals and is at odds with more general principles established by decisions of this Court. If permitted to stand, it will have a serious deleterious effect on the efforts of police to stem the illegal traffic in narcotics.

1. Three different courts of appeals, in cases also arising out of DEA airport encounters with suspected drug couriers, have held that agents do not violate the Fourth Amendment when they temporarily detain luggage reasonably suspected of containing narcotics for the purpose of obtaining a dog sniff. In *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), DEA agents developed reasonable suspicion that two deplaning passengers were carrying contraband in their suitcases. One of the agents informed the suspects that they were free to leave, but that their suitcases would be detained while the agents attempted to get a search warrant. The agents first awaited the arrival of a drug detection dog and then obtained a search warrant after the dog alerted to the presence of drugs in the luggage. The court held that the agents' actions adequately protected the suspects' privacy interest in their luggage and that, given their reasonable suspicions, "they would have been remiss in not detaining the bags for further investigation." 626 F.2d at 26.

The *Klein* court relied heavily on this Court's decision in *United States* v. *Van Leeuwen*, 397 U.S. 249

(1970), as establishing the general principle that the Fourth Amendment permits the temporary detention of effects for further investigation when police reasonably believe that those effects contain contraband. In *Van Leeuwen*, two packages sent through the United States mails aroused the suspicion of postal officials. The postal officials detained the packages for a day while police pursued certain lines of inquiry. The information obtained during this period was used to obtain a search warrant, and contraband was discovered in the packages.

A unanimous Court held that the detention did not violate the Fourth Amendment. The Court explained that the suspicious circumstances justified the detention pending further investigation; indeed, because "[t]he only thing done * * * on the basis of suspicion was detention of the packages," the *Van Leeuwen* Court recognized that it did not have to go as far as the Court had gone in *Terry* v. *Ohio*, 392 U.S. 1 (1968), in order to conclude that the detention involved "no possible invasion" of the Fourth Amendment protection "against 'unreasonable searches and seizures'" (397 U.S. at 252). The *Van Leeuwen* Court emphasized that "[t]he significant Fourth Amendment interest was in the privacy of this first class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained" (*id.* at 253). Thus, although the Court recognized that "detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment" (*id.* at 252), it concluded that "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited" (*id.* at 253).

Both the First and Ninth Circuits have followed *Klein* in applying the principles of *Van Leeuwen* to uphold the validity of temporary detentions of baggage in order to arrange a dog sniff. In *United States* v. *Viegas*, 639 F.2d 42 (1st Cir. 1981), cert. denied, No. 80-1344 (May 4, 1981), DEA agents reasonably suspected that an arriving passenger was carrying drugs in his suitcase. The agents sought to expose the suitcase immediately to a drug detection dog, to which the defendant agreed, but they learned that a dog was unavailable at that time. The agents then told the defendant that he was free to leave, but that his bag would be detained. The agents later obtained a search warrant and discovered cocaine in the suitcase. The court relied on *Klein* and *Van Leeuwen* in concluding that the agents' reasonable suspicion justified the temporary detention of the luggage, even though the detention undoubtedly inconvenienced the defendant. 639 F.2d at 45. The First Circuit subsequently reaffirmed this holding in another case in which luggage was detained on reasonable suspicion pending arrival of a dog, while the suspect was permitted to leave. *United States* v. *West*, 651 F.2d 71 (1981), petition for cert. pending, No. 81-307.

Similiarly, in *United States* v. *Martell*, 654 F.2d 1356 (9th Cir. 1981), DEA agents stopped the defendants upon their arrival at the San Diego airport on the basis of a reasonable suspicion that they were carrying contraband. Approximately 20 minutes later, the defendants and the luggage they were carrying were taken to a police office, where a narcotics detection dog alerted to the presence of narcotics in the luggage. The defendants were detained until a search warrant was procured, and a search of the bags revealed a large quantity of cocaine.

Relying on *Van Leeuwen*, *Klein*, and *Viegas*, the court of appeals held that the luggage detention was lawful even if detention of the defendants themselves violated the Fourth Amendment. 654 F.2d at 1359-1363. The court explained (*id.* at 1359; footnote omitted):

> In our view, * * * *Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a substantially less serious intrusion upon rights of the individual.
>
> * * * * *
>
> We look then to the standard of reasonableness as required by the fourth amendment in the seizure and detention of inanimate objects.

The decision in the instant case squarely conflicts with these decisions of three circuits. While the court below suggested some bases on which the cases could be distinguished factually (see note 8, *supra*), those distinctions do not diminish the conflict. Most of the grounds for distinction identified by the majority below are simply irrelevant to the legal issue presented by all of the cases. As Judge Kaufman pointed out (App. A, *infra*, 27a n.2), because the alleged infringement of respondent's rights was the dispossession of the luggage, it is of no consequence that the agents took the luggage to the dog at Kennedy Airport instead of bringing the dog from Kennedy to LaGuardia. Nor is the agents' alleged failure to disclose fully to respondent their intentions with respect to the luggage relevant to the issue here, because it is undisputed that the detention was against respondent's wishes. Moreover, the factual foundation of the majority's assertion that this non-

disclosure was unique to this case is erroneous. The agents' statement that they were detaining the luggage pending application for a search warrant appears to be almost identical to the explanation given by the agent in *Klein*. See 626 F.2d at 25. And the agents here gave respondent no reason to believe that the detention of his luggage would be indefinite; the agents informed him that the luggage would be returned if the magistrate refused to issue a search warrant (Tr. 89).

The majority below was correct in suggesting that the length of the detention could serve as a valid factual basis for distinguishing among otherwise similar cases. The length of a detention is an important factor to be considered in assessing its reasonableness. See *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), slip op. 8-9 n.12. But the length of the detention involved here until the sniff test could be performed, about 90 minutes, was not significantly different from those involved in the cases the majority sought to distinguish. While the opinion in *Klein* does not indicate how long the detention lasted, in *West* the bag was detained for about an hour before the dog arrived. *United States* v. *West*, 495 F. Supp. 871, 873 (D. Mass. 1980). And in *Viegas*, the record indicated that the agents were informed that no dog would be available for four hours when they decided to detain the bag. See No. 80-1344 Br. in Opp. 3.[9] Thus, it is apparent that there is no sound basis for distinguishing the instant case from those cases in other circuits that have upheld a temporary detention of luggage based on reasonable suspicion. Rather, the different result

[9] A copy of the government's response in No. 80-1344 is being furnished to respondent.

reached here can be ascribed exclusively to the majority's view that those decisions are incorrect. The decision below thus creates a square conflict among the circuits.

Resolution of this conflict is necessary both to clarify an important question of Fourth Amendment law and, more specifically, to guide DEA agents in the performance of their duties. The DEA's airport drug courier program is an integral part of a highly specialized law enforcement program designed to "intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States." *United States* v. *Mendenhall*, 446 U.S. 544, 562 (1980) (opinion of Powell, J.) The program involves the use of experienced agents specially trained to detect drug couriers. In some instances, these agents develop a reasonable suspicion that an individual is carrying narcotics in his luggage, and the agents are aware that a specific line of inquiry of limited duration may confirm or dispel that suspicion. It is important that agents know whether they are permitted to detain a suspect's luggage in order to conduct such an inquiry or whether they must allow the suspect to leave with his luggage, with the result that any contraband contained therein will be delivered successfully or destroyed. In the words of Judge Kaufman, the decision below places an "unwarranted hurdle[] * * * in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs" (App. A, *infra*, 28a).

2. Apart from its impact in the specific context of drug enforcement, the decision below also incorrectly analyzes certain broad principles of Fourth Amendment law. The panel majority suggests that the same standard applies to seizures as to searches, namely, in the absence of exceptional circumstances they are

per se unreasonable unless authorized by a warrant based upon probable cause (App. A, *infra*, 6a-7a). But it is well established that, because the principal Fourth Amendment interest in a package is in the privacy of its contents, a temporary seizure of a container may be effected in order to preserve the status quo even though a search would not be permissible. This is clear from *Van Leeuwen*, where the Court repeatedly emphasized that the detention did not violate the Fourth Amendment because the "significant Fourth Amendment interest" in the privacy of the mail was safeguarded. 397 U.S. at 253. Subsequent decisions reconfirm that Fourth Amendment standards for assessing the reasonableness of seizures are less stringent than those for searches. See *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). And, of course, police may temporarily detain unopened luggage while seeking a search warrant. See *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977).

More important, the court below erroneously held that the Fourth Amendment draws no distinction between the seizure of a person and the similar seizure of his property (App. A, *infra*, 16a). But the touchstone of Fourth Amendment analysis is the reasonableness of the police conduct, which can be assessed intelligently only by considering the extent of the intrusion. In the context of the legality of a temporary detention, this determination must be made by balancing "the degree to which the seizure advances the public interest" against "the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). See also *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (opinion of Powell, J.). It is clear from the decisions of this Court that

the constitutional duration limit of a detention based on reasonable suspicion will vary depending upon the interest invaded by the detention. In *Van Leeuwen* the Court held that a detention of mail for a day clearly was justified by reasonable suspicion, yet there can be little doubt that even a substantially shorter detention of a person would be invalid in the absence of probable cause. See, *e.g.*, *Dunaway* v. *New York*, 442 U.S. 200 (1979). While we do not necessarily take issue with the conclusion of the court below that the detention of respondent's luggage was a greater intrusion than the detention of the mail in *Van Leeuwen* (see App. A, *infra*, 20a), we suggest that it is even clearer that the temporary detention of respondent's luggage was a significantly lesser interference with his individual liberty than a detention of his person would have been.[10] Accordingly, reasonable suspicion can support a detention of *property* for a period of time that exceeds the maximum period for which a *person* could be detained given the same degree of suspicion. In this case, the limited inconvenience to respondent of having his luggage detained for 90 minutes was justified by the facts that gave rise to the agents' suspicion that the luggage contained narcotics.

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[10] The court below suggests that the temporary detention of an individual's suitcase may be catastrophic if it contains medicine essential for the treatment of a heart condition. In such circumstances, of course, it would be unreasonable, and therefore violative of the Fourth Amendment, for the police to refuse access to the seized luggage for the purpose of removing the necessary items. Cf. *United States* v. *Benjamin*, 637 F.2d 1297, 1299 (7th Cir. 1981) (suspect permitted to remove certain personal effects from detained briefcase).

## CONCLUSION

The petition for a writ of certiorari should be granted.

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MARCH 1982

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 1312—September Term, 1980

(Argued May 14, 1981 Decided September 16, 1981)

Docket No. 81-1034

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UNITED STATES OF AMERICA, APPELLEE

*—against—*

RAYMOND J. PLACE, DEFENDANT-APPELLANT

---

Before:

KAUFMAN, MANSFIELD and OAKES,
*Circuit Judges*

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Appeal from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), entered in the Eastern District of New York, Thomas C. Platt, *Judge* (498 F. Supp. 1217).

*Reversed.*

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MANSFIELD, *Circuit Judge*:

The pivotal question raised by this appeal is whether a warrantless government seizure of a per-

son's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment rights. We hold that it does.

Raymond J. Place appeals from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), entered in the Eastern District of New York by Judge Thomas C. Platt after denial by a Memorandum and Order, 498 F. Supp. 1217, of his motion to suppress the contents of luggage seized from him at LaGuardia Airport, and his subsequent plea of guilty with reservation of his right to appeal the ruling on his motion to suppress. Place contends that in violation of the Fourth Amendment law enforcement officers stopped him at both Miami International and LaGuardia Airports without specific articulable facts justifying a reasonable suspicion that he was engaged in unlawful activity and that they made a warrantless seizure of his suitcases at LaGuardia Airport without probable cause. Since the warrantless LaGuardia seizure of his suitcases without probable cause was unreasonable, precluding their being used as evidence against him, we reverse.

On Friday, August 17, 1979, Place entered the Miami International Airport for the purpose of boarding a National Airlines flight to New York's LaGuardia Airport. While on line to purchase his ticket he attracted the attention of two Dade County detectives who were observing passengers in the terminal. The officers observed him scanning the area of the terminal and noticed that he appeared extremely nervous. They watched him for 20 minutes while he stood on line for his ticket and noticed that he in turn was beginning to watch them, although he pretended not to do so.

After Place had purchased his ticket and checked his bags, the detectives separated. One followed Place as he headed for the departure gate, the other went to check the name on Place's baggage. Place did not, however, proceed directly to the departure gate. Instead he walked part of the way there, turned around, walked around the waiting room in a circle while looking over his shoulder, and then stopped in a rest room.

The two detectives rejoined at this point, and, when Place came out of the rest room shortly thereafter, they followed him to the airline security checkpoint. At this point the agents proceeded to approach Place, asking him his name and requesting that he produce identification. He gave both. The detectives explained that they were investigating narcotics traffic and requested the right to examine Place's baggage. Place said that he did not use narcotics, that he did not have any in his baggage, and that the detectives were welcome to examine that baggage. Because there were only five minutes left before Place's flight to New York, the detectives did not search the bags and bid him farewell. As they parted Place turned around and said to the officers that he had recognized that they were policemen.

This remark caused the detectives to rush to the baggage loading area and re-examine Place's bags. In so doing they noted Place's address on the bags and observed a slight discrepancy between the street numbers given on the two bags. The detectives then obtained from National Airlines the call back number Place had given it for his reservation. They called the police department of Hallendale, Florida, the town in which the baggage addresses were located, and inquired whether those addresses existed and

what the address associated with the phone number was. They were informed that neither address existed but that the number was that of a third address on the same street.

On the basis of this incident and the information they had obtained, the detectives called Special Agent Gerard Whitmore of the New York office of the Drug Enforcement Agency (DEA). They informed Whitmore of the events that transpired at Miami International Airport and of the information they had obtained about Place.

Relying on this information, Agent Whitmore and another DEA agent, Alfredo Iglesias, waited for Place at the National Airlines arrival gate in La-Guardia Airport. They recognized Place among the passengers arriving at the gate from the description they had received. He was engaged in a conversation with another passenger as he and that passenger walked through the terminal. While the two walked through the terminal, Place surveyed the area around him, as he had done in Miami. Fearing that he would spot them if they continued observing him, the agents proceeded to the baggage claim area, awaiting his arrival.

Place soon arrived near the baggage claim area, but did not enter it. Instead he stood outside, again scanning the area. When the flight's luggage arrived he entered the area. After fiddling with the handle of one bag, he picked up his two bags and walked out of the area. The two agents followed him, but were careful to avoid appearing to do so. Place walked to the TWA baggage claim area, continuing his scanning as he went. When he arrived there he used one of the telephones, apparently to call a limousine.

Agent Whitmore now decided to interview Place. He and Agent Iglesias walked up to Place and identified themselves as federal narcotics agents. Place responded by saying that he had known that the two were "cops." He then asked why he was being stopped and was told it was because, based on information from the Dade County police and on their own observations, the agents suspected him carrying narcotics. Place did not say anything and Agent Iglesias asked him if the bags he was carrying were his. He replied that they were.

At this point Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. This was contrary to what the agents had been advised by the Dade County detectives. Whitmore stated that he had understood that Place had not been searched. Place replied that that understanding was incorrect; he had, he claimed, been searched. The agents then asked for and Place produced identification—a New Jersey driver's license and his airline ticket receipt.

Agent Whitmore now asked Place if he would consent to a search of his baggage. Place refused. Whitmore told Place that the agents were "going to take the luggage to a neutral party, to a Federal judge, to make a determination as to whether or not there was probable cause for a search warrant." Place was also told that he was free to accompany the agents on this trip. It was then that Agent Iglesias took the driver's license to run a computer check on it, which revealed no violations.

When Iglesias returned he again asked Place if the bags were his. Place said that the larger of the bags was definitely his but that he was unsure about the smaller because it had had his name tag on it in Miami and the tag was no longer attached. After

the agents asked Place to provide the combinations of the bags' locks, which he refused to do, Iglesias picked up the bags and Whitmore gave Place a piece of paper with his office number and a 24-hour emergency number at which he could be reached. Place then ran after Iglesias and demanded that he give his name and badge number. Iglesias gave his name and said that he could be reached at the same telephone numbers.

The agents put the bags in the car and drove to Kennedy Airport, leaving at about 4:10 P.M. and arriving approximately 35 minutes later. After a delay in finding a dog handler, the suitcases were subjected to a "sniff test" by "Honey," a dog trained to detect controlled substances. At about 5:30 or 5:40 P.M. Honey reacted positively to (i.e., detected a controlled substance in) the smaller bag and neither positively nor negatively to the larger. Agent Whitmore contacted the United States Attorney's office and asked for instructions. He was told to wait until Monday morning (the day being Friday) and at that time to come to apply for a search warrant.

On Monday morning Agent Iglesias applied for a search warrant for both bags. A federal magistrate granted a warrant for the smaller bag only on Monday afternoon. On opening that bag Whitmore found bags containing 1,125 grams of cocaine. The indictment, motion to suppress, and guilty plea followed.

## DISCUSSION

At the outset, review of a few relevant constitutional principles is helpful. The Fourth Amendment protects not only "persons" but their "effects" against "unreasonable" government "seizures." With rare exceptions the seizure of a person or his effects

is deemed *per se* "unreasonable" unless a warrant has first been obtained from a neutral magistrate upon a showing of probable cause. *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

"Probable cause," while not requiring evidence sufficient to convict, *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963), nevertheless cannot exist in the absence of sufficient evidence to lead a reasonable and prudent person to believe, not merely suspect, that a crime has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949); *United States* v. *Ceballos*, —— F.2d —— (2d Cir. 1981), Dkt. No. 80-1420, Slip Op. 3983, 3999-4000.

Even in those rare instances where warrantless seizures are permitted, such as the "automobile exception," *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the police must still have probable cause, *id.* at 51, but the seizure is allowed for the reason that, because of the exigencies of the situation with which they are confronted, the police cannot obtain the timely issuance of a warrant without losing the criminal or his contraband. Even in those exceptional cases the powers of law enforcement agents have been carefully restricted, see, e.g., *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841 (1981); *United States* v. *Chadwick*, 433 U.S. 1 (1977). Seizures for "investigatory" purposes have consistently been declared unconstitutional, see, e.g., *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

> " 'The requirement of probable cause has roots that are deep in our history.' *Henry* v. *United States*, 361 U.S. 98, 100 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth

> Amendment. . . . The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. See *Brinegar* v. *United States*, *supra*, at 175-76.
>
> ". . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979).

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Supreme Court opened a narrow exception to the foregoing principles, permitting a brief "on-the-spot" investigative stop of a person by police where probable cause did not exist but the officers were possessed of sufficient specific articulable facts to justify a reasonable suspicion that the person stopped was engaged in unlawful activity. See in accord, *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *United States* v. *Brignoni-Ponce*,

422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Sibron* v. *New York*, 392 U.S. 40 (1968). The exception was made for the reason that upon balancing the public interest in protection from crime against the individual's right to security of his person and effects free from arbitrary interference by law officers, it was decided that the intrusion was so "minimal" in contrast to traditional arrest and seizure that a limited leeway should be permitted in the interest of law enforcement. *Dunaway* v. *New York*, *supra*, 442 U.S. at 209-11. Indeed some members of the Court (Justices Stewart and Rehnquist) were of the view that such conduct did not amount to a "seizure" as that term is used in the Fourth Amendment, *United States* v. *Mendenhall*, 446 U.S. 544, 551-57 (1980).

Thus the degree to which a person's liberty may be curtailed when law enforcement agents have less than probable cause is determined by balancing the "public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878. *Terry* upheld the brief stop and frisking of a suspect for weapons as justified by the combined governmental interests in preventing crime and in protecting police officers confronting potentially armed suspicious individuals. *Brignoni-Ponce* upheld the stopping of an automobile and the questioning of its occupants within 100 miles of the Mexican border when reasonable suspicion existed and the procedure generally took less than a minute. 422 U.S. at 880.

*Terry* soon provided the principal weapon used by law enforcement authorities to curtail use of commercial airlines as a means of unlawful transportation of narcotics and other contraband. Passengers

suspected of acting as couriers could now lawfully be stopped for interrogation by officers having a reasonable basis for suspecting them of criminal activity. Gradually various sets of circumstances deemed sufficiently objective and articulable in combination to justify a reasonable suspicion of unlawful activity were developed, with courts usually sympathetic toward upholding investigative stops on the basis of facts that would normally be viewed as innocent but for characterizations of government agents, including a "nervous" appearance on the part of the passenger; his arrival from a "source" city (i.e., a city described on the *ipse dixit* of drug enforcement law officers as a drug-trafficking center, without any supporting evidence); the passenger's looking "steadily ahead" after alighting from a plane; his frequently glancing sideways or backwards as if searching for someone; his deplaning as the first of the alighting passengers; his deplaning last; his cash purchase of his ticket rather than through a credit card; his appearing to be a person of Hispanic background; the "reputation" of the passenger as a narcotics dealer; and the like. Some drug enforcement agents, such as the "ubiquitous" Agent Whitmore in the present case, *see United States* v. *Forero-Rincon*, 626 F.2d 218, 220 n.4 (2d Cir. 1980), were recognized as having made stops in a substantial number of past instances where their suspicions proved to be correct but without evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops. Such airport stops, for instance, have been upheld by us in *United States* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980); *United States* v. *Vasquez-Santiago*, 602 F.2d 1069

(2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979); *United States* v. *Rico*, 594 F.2d 320 (2d Cir. 1979); *United States* v. *Riquelmy*, 572 F.2d 947 (2d Cir. 1978); *United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977). However, in *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980), we concluded that the complex of conduct viewed by Agent Whitmore in that case was "wholly insufficient to constitute 'specific and articulable' facts supporting a reasonable suspicion that [the defendants] were involved in drug trafficking," *id.* at 36. Finally, an end was put to the gradual relaxation of the factors justifying reasonable suspicion by the Supreme Court in *Reid* v. *Georgia*, 448 U.S. 438 (1980), where it concluded that the drug enforcement agent at the airport "could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 441.[1]

Turning to the present case, the record is clear that the drug enforcement agents did not have probable cause to arrest Place or seize his baggage at LaGuardia Airport. Nervous behavior, traveling from a so-called "source city," minor errors on a baggage tag, telling an undercover officer that his identity as such was recognized by the suspect, and

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[1] The lower court had relied on the facts

> "that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags." 448 U.S. at 441.

the other factors involved here may be abnormal, but by themselves they are clearly not enough to constitute probable cause. The district court, while stating that it would not "pass on that question" (existence of probable cause), 498 F. Supp. at 1228 n.7, erred in suggesting that probable cause existed. Indeed the government does not argue on this appeal that probable cause existed. Instead, it points to a combination of circumstances observed by law enforcement officials at the Miami and LaGuardia Airports, which were found persuasive by the district court, as providing articulable facts justifying a reasonable suspicion of narcotics trafficking.[2] Place,

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[2] At Miami International Airport the following facts were relied upon:

"1. Defendant Place was departing from a 'source city.'

"2. Defendant systematically scanned the immediate area in the lobby in which he was standing and looked very closely at each person that was seated or standing in that area.

"3. Defendant noticed and paid close attention to Mr. McGavock when he left the line.

"4. Defendant stared directly at the detectives two or three times as the detectives moved around the lobby.

"5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby again.

"6. Defendant paid for his ticket in cash.

"7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

"8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed." 498 F. Supp. at 1224.

[Footnote continued on page 13a]

on the other hand, lists other circumstances in rebuttal and argues that many of those relied on by the government are wholly consistent with innocence.[3] We find it unnecessary to resolve this issue

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[2] [Continued]

The following additional facts were claimed to justify the LaGuardia Airport stop:

"1. Defendant Place broke out into a sweat when asked about narcotics by Detective McGavock and Facchiano in Miami International Airport.

"2. Defendant Place's parting remark to the same detectives that he had spotted them in the lobby.

"3. The discrepancy between the addresses listed on the identification tags attached to defendant's baggage.

"4. The fact that neither of those addresses were known to exist.

"5. Defendant's scanning activity in LaGuardia Airport.

"6. Defendant's nervous behavior and conduct in LaGuardia Airport.

"7. Defendant's spontaneous remark on being approached by the special agents that 'I knew you guys were cops. I spotted him as soon as I got out of the Plane.'" 498 F. Supp. at 1225-26.

[3] Place notes that at Miami:

1. The stop was made because the detective "had a feeling."

2. The information Place gave was accurate and the discrepancy on his luggage tags was minor.

3. The detectives had no previous knowledge that he was involved in the "drug culture."

4. There were no suspicious indications that Place had contraband hidden in his clothing.

5. He was alone and therefore there were no suspicious signals or attempts to avoid being seen with compatriots.

He further notes that at LaGuardia:

[Footnote continued on page 14a]

for the reason that, even assuming that circumstances justifying an investigatory stop existed, the prolonged seizure of Place's baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights.

Whether or not an investigative stop be labelled a "seizure," see *United States* v. *Mendenhall*, *supra*, 446 U.S. at 552, its legality depends on its brevity and relative unintrusiveness. The word "stop" implies an interruption of short duration, restricted to the immediate vicinity in which it occurred. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope," *Dunaway* v. *New York*, *supra*, 442 U.S. at 210. Applying the principle that "[t]he greater the intrusion, the stronger the basis for the officers' action must be," *United States* v. *Vasquez*, 638 F.2d 507, 520 (2d Cir. 1980), the investigative stop has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found and his baggage located. See, e.g., *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880 ("usually consumes no more than a minute"). Where the suspect has been removed by the police from the spot where he was confronted to another location such as a police station, even for a short period, the conduct has been held to violate the Fourth Amendment. See, e.g., *Dunaway* v. *New York*, *supra*, 442 U.S. at 212-13, which held unconstitutional a seizure

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[a] [Continued]

1. He was not asked to explain his scanning or his nervousness even though he was being stopped in part because of them.

2. A computer check of his driver's license revealed nothing suspicious about him.

of a defendant that, while not an arrest under state law, was so intrusive as to be "indistinguishable from a traditional arrest," 422 U.S. at 212.

It has been contended that *Terry*, while applicable to investigative stops of persons, should not permit police detention of "effects," since the latter, unlike a person, "cannot resume their course independent of the owner" after the property has been temporarily seized. See Comment, *Seizing Luggage on Less than Probable Cause*, 18 Am. Crim. L. Rev. 637, 645 (1981). However, for present purposes, in addition to assuming without deciding that an investigative stop was justified, we are willing also to apply the principles of *Terry* to seizures of property. If these principles were not applicable, the warrantless seizure of Place's baggage without probable cause would clearly violate the Fourth Amendment.

Applying the foregoing principles, it is apparent that the prolonged seizure of Place's baggage cannot be upheld as an investigative stop and will not stand constitutional scrutiny. The initial detention of Place and his baggage at LaGuardia, even if justifiable as an investigative stop, failed to yield any evidence providing probable cause for the arrest of Place or the further seizure of his baggage. No information was uncovered indicating that his baggage contained narcotics. He produced his New Jersey driver's license and his airline ticket receipt but refused, as was his constitutional right, to consent to a search of his baggage. At that point the agents were under a duty to release him and his baggage. Yet the agents, while permitting him to go, took his baggage away from him, without his consent, for a substantial period of time, removing it to another location several miles away for a period of at least 1½ to 2 hours for the admitted purpose of determining

whether it contained narcotics. The question before us is whether this amounted to a reasonable warrantless investigative stop of his baggage without probable cause within the meaning of *Terry*. We hold that it did not.

There can be no question but that if the agents had taken Place himself into custody and removed him from LaGuardia to the J.F. Kennedy Airport for the purpose, through use of a trained sniffing dog, of determining whether he had narcotics on his person, this would have constituted an unlawful seizure of him in violation of his Fourth Amendment rights. *Dunaway* v. *New York*, *supra*, 442 U.S. at 216 (removal of suspect to police station for interrogation without probable cause held to be an unreasonable seizure). It may be argued that a different standard of reasonableness should apply to a detention of baggage than that of a person, on the theory that the inconvenience to the owner from seizure of his baggage may be less than when he is personally arrested without a warrant and that the intrusion is less severe. But the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

The degree of intrusion and inconvenience accompanying police seizure of a person's baggage in a particular case may vary according to the specific circumstances, including the duration of the detention and the person's immediate needs. If, for instance, the owner were about to board another plane

for distant parts, or needed medicine from his baggage essential for treatment of a heart or diabetic condition, or was deprived of documents or merchandise necessary to close an important business transaction, the seizure of his baggage for any substantial period of time could be extremely harmful or even catastrophic. If, on the other hand, the person were not in any such hurry or had no such emergency personal needs, it could be argued that a greater invasion of his personal freedom or use of his property should be tolerated. But the reasonableness of a detention without probable cause should not turn on whether the person affected is a healthy vagrant with time on his hands or a busy, ulcer-ridden bank president or doctor who needs his baggage immediately to perform important pressing missions.

Such a case-by-case status test is unacceptable. Courts which have addressed the reasonableness of particular forms of detention have focused on factors unrelated to the particular inconvenience to the individual in the specific case before them, concentrating on the general nature and extent of the detention. See, e.g., *United States* v. *Walling*, 486 F.2d 229 (9th Cir. 1973). It is this desire for an objective standard of equal application that has led to a recommendation by the American Law Institute that a detention not based on probable cause and not consented to be limited to a maximum of twenty minutes' duration. *ALI Model Code of Pre-Arraignment Procedure* § 110.2 (1) (1975). Otherwise the "investigative stop" concept would soon undermine the basic probable cause requirement, which represents a careful weighing of the conflicting interests of the government in effective law enforcement and the individual in personal freedom. The standard must be judged according to the

effect its application would have upon the average innocent passenger, and not, with the aid of 20-20 hindsight, by the success it yielded in uncovering contraband in a particular case. One must take into account the probably countless other cases where the detention without probable cause did not uncover any incriminatory evidence.

In the present case, if the agents had, on the basis of a reasonable suspicion but without probable cause, merely exposed Place's baggage to a trained sniffer as he was passing through LaGuardia, this brief detention might, assuming reasonable grounds for suspicion, fall within the limits of *Terry* and its progeny. The invasion of his rights would then have been brief and minimal. Here, however, the "investigative" seizure lasted for almost two hours (from slightly before 4:00 P.M. until 5:45 P.M. when the sniffer established probable cause). Moreover, measured by the more objective gauge of what would have occurred if probable cause had not been established, the seizure would have been protracted for at least another 35 minutes, or until 6:15 P.M., before the baggage would have been returned from JFK Airport to LaGuardia and delivered to its owner.

In our view this protracted dispossession cannot reasonably be characterized as a *Terry*-type "investigative stop." It amounted to a seizure without probable cause of Place's effects in violation of his Fourth Amendment rights. The violation was exacerbated by the high-handed procedure adopted by the agents. They did not inform Place of the place to which they were taking his baggage or how long he might be dispossessed of it. Agent Iglesias simply removed the bags without consent and Agent Whitmore gave Place a piece of paper with his office number and a 24-hour

emergency number at which he could be reached. Indeed, the agents lied to Place, informing him that they were taking the baggage to a federal judge when in fact they were transporting it to JFK Airport. As far as the owner was concerned the "investigative" seizure of his baggage might last for days or weeks. This conduct is not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment. A person is at least entitled to be informed accurately of the reason for seizure of his effects, the place to which they are being taken, and, assuming probable cause is not found, approximately when he may expect the return of his property.

In reaching our decision we have not overlooked the seriousness of the suspected offense in the present case or the danger posed by the suspect to the public, which must be balanced against the individual's right to have his personal effects free of arbitrary interference by law enforcement officers. *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21; *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878; *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (Opin. of Powell, J.). The public interest in prevention of drug trafficking is great. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 565. But the government has not adduced any evidence that intrusions of the seriousness inflicted here are essential to enforcement of our drug laws. On the contrary, the fact that the government keeps a trained drug sniffer at JFK Airport, which presumably is available for immediate scenting of baggage suspected of containing narcotics, would indicate that it should be able to maintain a similar facility at a busy airport such as LaGuardia. Indeed, having been alerted by phone calls from the detectives at Miami Airport, 2½ hours away by air, that Place was sus-

pected of bringing drugs in his baggage, no reason has been shown why Agents Whitmore and Iglesias could not have had the sniffing dog, while Place was in transit, brought from JFK Airport to LaGuardia, ready to perform its task with minimum detention when Place arrived at LaGuardia.

The government's reliance upon *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), as support for the seizure of Place's bagage is misplaced. That case is clearly distinguishable. There the owner of parcels deposited them as first-class mail with the U.S. Postal Service, thereby voluntarily relinquishing custody and control over them for the indefinite period (at least a couple of days) required for forwarding and delivery. Based on specific articulable facts justifying suspicion that the packages contained contraband, postal agents detained the packages, which were already in their lawful custody, for further investigation which led to issuance of a search warrant. Unlike the dispossession of hand baggage in a passenger's custody, which constitutes a substantial intrusion, the mere detention of mail not in his custody or control amounts to at most a minimal or technical interference with his person or effects, resulting in no personal deprivation at all. Moreover, the *Van Leeuwen* Court was very careful to point out that "[w]e only hold that on the facts of this case" a short detention of mail is reasonable; it also conceded that "[t]heoretically . . . detention of mail could at some point become an unreasonable seizure." 397 U.S. at 252-53. Under the circumstances of this case, reliance on *Van Leeuwen* is unjustified.

For these reasons we find unpersuasive the decisions of other circuits upholding on the basis of *Van Leeuwen* the constitutionality of detentions of baggage as *Terry*-type investigative stops. See *United*

*States* v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). Moreover, in none of these cases does it appear (1) that the detention of the baggage for investigation lasted for as long a period of time as in the present case, (2) that the baggage was removed from the airport to another location without the passenger's consent, (3) that the agents concealed their plans for investigation of the baggage, or (4) that they indicated that the baggage detention would be of indefinite duration. On the contrary, in each case the agents merely asked the suspect to wait for a short period of time while a sniffing dog was brought to the scene. Although in *Viegas* that baggage was retained at the airport for a longer period because of the unavailability of the dog, the suspect there had already expressly consented to "a detector dog sniff," 639 F.2d at 44. Thus the intrusions did not approximate the seriousness of that here. As indicated above, if such expeditious procedure had been followed in the present case the detention might then have been upheld as a permissible investigative stop. See *United States* v. *Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). It is simply not a "temporary detention for investigative purposes" when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment rights.

The judgment of conviction is reversed.

OAKES, *Circuit Judge* (concurring):

I happily concur in the well reasoned opinion of Judge Mansfield which conforms, I believe, wholly to the Fourth Amendment law as so far enunciated by the Supreme Court.

In so concurring, however, I by no means retract or qualify the view first enunciated for this court in a border stop case, *United States* v. *Barbera*, 514 F.2d 294 (2d Cir. 1975), and further elaborated upon in my dissenting opinion in *United States* v. *Vasquez*, 612 F.2d 1338, 1352 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980). That view, simply stated and deriving in large part from the views perhaps best expressed by Professor Anthony Amsterdam in his Holmes Lecture, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367 (1974), that the Fourth Amendment should be read not atomistically, but regulatorily. Such a view leads one to conclude that in cases such as the so-called airport stop or search case here, sidestepping strict requirements of probable cause in warrantless searches or seizures should be permissible only if, as, and when the search or stop is made pursuant to duly adopted, proper, nondiscriminatory, and reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review. Absent such rules or regulations we are so much in the realm of the individual law officer's discretionary subjective sense of suspicion as to permit of the arbitrariness and unbridled official caprice that led our Forebears, as Judge Mansfield suggests, to adopt the Fourth Amendment. Until better advised by higher Authority, I will continue to take what some would call a narrow view of extension of the "exception" to the general rule of probable cause set forth in *Terry* v.

*Ohio*, 392 U.S. 1 (1968). I am satisfied that Judge Mansfield has taken a similar view with conventional case support, and I write this concurrence only to refer to this somewhat less conventional view which nevertheless continues to find what seems to me like a receptive ear in some of the expressions in more recent Supreme Court opinions. *See, e.g., Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979):

> To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor *upon some other substantial and objective standard or rule* to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . . ." *Terry* v. *Ohio*, *supra*, 392 U.S. at 22, 88 S.Ct. [1868] at 1880.

(Emphasis added.)

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KAUFMAN, *Circuit Judge*, dissenting:

The majority holds that the detention of Raymond Place's cocaine-filled luggage, even if an investigatory stop were justified, constituted a violation of Place's Fourth Amendment rights. It takes this position because it is of the opinion that a holding to the contrary would extend *Terry* "stops" into a general search warrant.[1] I cannot agree that the investiga-

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[1] One cannot quarrel with the notion that *Terry* stops, approved by the Supreme Court, expanded the law in a manner which some seem to find unsettling. The Supreme Court, however, ever mindful of the need to protect precious Fourth Amendment rights, safeguards them zealously. The Court, guided by the tenets of the Constitution, has thoroughly con-

tive stop of Place's luggage was unreasonable within the meaning of *Terry* or that affirmance of the district court's holding would produce an untenable result. Accordingly, I dissent.

The Fourth Amendment prohibits only those seizures which are "unreasonable." Although searches conducted without prior judicial approval are considered "unreasonable," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), *Terry* instructs that a law enforcement official may, in appropriate circumstances, detain a person to investigate possible criminal activity without possessing either warrant or probable cause to arrest. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968). In assessing the propriety of these so-called *Terry* stops, courts must evaluate the scope of the particular intrusion. *Id.* at 17 n.15. *See Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Mendenhall*, 446 U.S. 544 (1980). Furthermore, in determining the intrusiveness of a stop, the government interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy. *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States* v. *Mendenhall*, *supra*, 446 U.S. 561 (Powell, J. concurring).

I fail to see how the majority, after weighing the competing interests involved here, could conclude that the *Terry*-type stop amounted to a seizure in violation of Place's Fourth Amendment rights. The public interest in holding the suitcase for a "sniff test" was

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sidered the constitutionality of *Terry* stops and has resolved the issue. Where the facts fit the *Terry* principles, I do believe lower courts consider the Supreme Court's mandate the governing authority. [This footnote was added after the slip opinion was first published. See page 29a, *infra*.]

compelling—detection of an individual who trafficks in drugs. *See United States* v. *Mendenhall, supra,* 446 U.S. at 561 (Powell, J. concurring). Surely, the 1,125 grams of cocaine Place was carrying in his suitcase could not be regarded as an amount so insignificant as not to warrant concern. In addition, if Place had been allowed to leave with his baggage, it is likely the evidence would have been destroyed. Indeed, just such a consideration forms part of the Supreme Court's rationale for permitting a warrantless seizure in some instances involving automobiles. *See United States* v. *Chadwick,* 433 U.S. 1 (1977); *Chambers* v. *Maroney,* 399 U.S. 42 (1970).

Moreover, in answer to the agents' questions, Place falsely claimed several times that both he and his luggage had been searched in Miami, refused to admit that he owned a valise which clearly belonged to him, and suggested that the agent abandon his law enforcement duties. Coupling Place's behavior in the Miami and LaGuardia airports, conduct, we are told by experts, to be characteristic of a drug courier, with these responses reveals such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained Place's bags.

The majority, however, finds that a less than two-hour detention of Place's cocaine-filled luggage—not Place—outweighs even such a forceful governmental interest. Place, my brothers seem to deduce, suffered so great an inconvenience that his privacy interests were violated. I do not believe so. I must emphasize that this is not an instance of taking a person into custody, an event which must be supported by probable cause. *See Dunaway* v. *New York,* 442 U.S. 200 (1979). Neither are we dealing with an actual search

which must be grounded in probable cause. We merely must determine the propriety of detaining baggage. Furthermore, the majority seems to agree the investigatory stop of Place's person could have been justified. If this is so, the reasoning underlying their greater concern for Place's effects simply eludes me.

My brothers perhaps react so strongly not because the law calls for it, but because they are particularly offended by what they term the "high-handed procedure" of the agents. They fail to recollect that Place was offered the opportunity to accompany his bags. He refused, asserting he had pressing business elsewhere. Certainly Place may still have been inconvenienced had he gone with the agents, but the Supreme Court has suggested the appropriate alternative course of action to be followed: Place should simply have consented to a luggage search. *See Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979). Instead, he asked whether an "arrangement," a euphemism for a bribe, could be made so that he could leave with his suitcases. Moreover, inconvenience has never been the sole standard for delineating the reasonableness of an investigatory stop. Causing an automobile to pull over merely because of an erratic pattern of driving with a subsequent questioning of the driver and a search of the car's interior has been held permissible by the Supreme Court. *See Robbins* v. *California*, 49 U.S.L.W. 4906 (U.S., June 30, 1981). Surely, this is a greater intrusion on an individual's privacy and convenience than a brief detention of baggage.

The majority, moreover, ignores the critical difference between an individual's privacy interests in the contents of his suitcases as distinguished from the suitcases themselves. In *United States* v. *Chad-*

*wick, supra*, 433 U.S. at 13 n.8, the Supreme Court explicitly distinguished between these two interests by stating that a person's principal privacy interest lies not in the baggage itself, but in the contents. *Accord, Arkansas* v. *Sanders, supra*, 442 U.S. at 764. A search of the interior of the suitcase, therefore, would have been much more intrusive than temporarily removing the bags from Place's possession.

Similarly, while recognizing the importance of the privacy interest in first-class mail, the Court in *Van Leeuwen* stated that no Fourth Amendment interest was disturbed by delaying the forwarding of mail because the privacy interest was in the packages themselves; that privacy was protected until the approval of a magistrate was obtained. *United States* v. *Van Leeuwen*, 397 U.S. 249, 253 (1970). I am indeed aware of the possible difference between the privacy interest in packages placed in the mails and in luggage carried by an individual, a point the majority labors to emphasize. I do not, however, find such nebulous distinctions as persuasive as my brothers.[2] We are searching for principles

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[2] I also remain unconvinced that decisions of other circuits which consider baggage detention a *Terry* stop are distinguishable. *See United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). The majority finds differences only through ignoring patent similarities with the situation here. My brothers, for instance, claim that the agents indicated Place's luggage would be detained for an indefinite period. In *Viegas*, the agents' comments could fairly be said to imply the same notion. *See United States* v. *Viegas, supra*, 639 F.2d at 44. Furthermore, the argument for distinction is somewhat tenuous. How could it matter that the bags were moved to another location when the majority states that dispossession itself is the cardinal fault?

to guide us by turning to *Van Leeuwen*, not *minutiae*, and it seems clear to me the Supreme Court's counsel is applicable to suitcases as well as to mail. By applying the Court's reasoning, the conclusion is inescapable that detaining Place's luggage did not violate his privacy interest.

I would hold, on the facts presented to us here, that the temporary detention of Place's luggage was a reasonable "stop" within the meaning of *Terry*. At the time the bags were detained there were objective and articulable facts to warrant the agents' belief that Place's bags contained contraband. This suspicion was based on the same conduct which justified the investigatory stop of Place's person. I believe we make bad law today in holding that a valise cannot be detained under the circumstances here. This, it seems to me, totally ignores the unwarranted hurdles we are placing in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
NEW YORK 10007

A. DANIEL FUSARO
Clerk

U.S.A. v. Raymond J. Place
Docket No. 81-1034

Decided September 16, 1981
September Term, 1980

Page 4851, line 7—after "search warrant." insert new footnote call "[1]".

Page 4851, bottom of page—insert the following:

> "[1] One cannot quarrel with the notion that *Terry* stops, approved by the Supreme Court, expanded the law in a manner which some seem to find unsettleing. The Supreme Court, however, ever mindful of the need to protect precious Fourth Amendment rights, safeguards them zealously. The Court, guided by the tenets of the Constitution, has thoroughly considered the constitutionality of *Terry* stops and has resolved the issue. Where the facts fit the *Terry* principles, I do believe lower courts consider the Supreme Court's mandate the governing authority."

Page 4854, line 19—delete "brothers.[1]" and insert "brothers.[2]" in place thereof.

Page 4854, bottom of page—delete footnote numeral "[1]" and insert footnote numeral "[2]" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CORRECTED COPY

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and eighty-one.

Present:

Hon. IRVING R. KAUFMAN
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges

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#81-1034

UNITED STATES OF AMERICA, APPELLEE

*v.*

RAYMOND J. PLACE, DEFENDANT-APPELLANT

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[Filed Sept. 16, 1981]

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Arthur Heller
by ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of November, one thousand nine hundred and eighty-one.

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No. 81-1034

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RAYMOND J. PLACE, DEFENDANT-APPELLANT

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[Filed Nov. 30, 1981]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United States of America,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that

no such judge has requested that a vote be taken thereon.

/s/ A Daniel Fusaro
A. DANIEL FUSARO
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. NEW YORK

No. 79 CR 584

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RAYMOND J. PLACE, DEFENDANT

Sept. 29, 1980

PLATT, District Judge.

Defendant, who is charged with violating 21 U.S.C. § 841(a)(1), possession with intent to distribute cocaine, has moved to suppress all physical evidence taken from him by Drug Enforcement Agents on August 17, 1979. He alleges that his Fourth Amendment rights were violated when he was stopped for questioning in both Miami and LaGuardia International Airports and when his baggage was seized at LaGuardia and searched pursuant to a warrant issued by United States Magistrate John Caden.

The facts are as follows:

On August 17, 1979, Dade County Detectives Robertson McGavock, John Facchiano, [J]odi Wolf and Everett Titus were observing passenger activity at the National Airlines ticket counter in Miami International Airport. Detective McGavock had taken a place in the ticket line while the other detectives stood off to one side watching the queue. (Tr. 8-9).

During the surveillance, one person, later to be identified as the defendant in the instant case, at-

tracted Mr. McGavock's attention. (Tr. 9). Carrying two black suitcases and a brown handbag, defendant had arrived on the line directly behind Mr. McGavock, and immediately began "scanning the lobby area . . . looking very closely at each person that was seated or standing in . . . the immediate area." (Tr. 10). This systematic "scanning" continued for the entire twenty minutes that defendant spent in the line. (Tr. 10).

Five minutes after defendant entered the line, Mr. McGavock stepped out of it to speak to Detective Facchiano about the defendant.[1] As this transpired, defendant fixed his gaze upon the two detectives and continued to watch as Mr. McGavock left Mr. Facchiano and moved to different locations within the immediate lobby area. (Tr. 11-12). Each time Mr. McGavock switched positions, the defendant kept him under attentive view, though if the detective looked at him, the defendant would endeavor to appear as if he were not looking at Mr. McGavock. (Tr. 12).

Defendant finally arrived at the head of the line, paid for his ticket in cash and checked his bags. In completing this last act, he turned and looked over his shoulder to scan the lobby once again, but, when Detective McGavock came into his view he stopped scanning and focused on the detective. (Tr. 13). Defendant then turned back to the counter, completed his transaction, and began walking toward Concourse F, the departure gate for National Airlines. (Tr. 14).

Mr. McGavock then moved quickly to the counter and spotted defendant's bags on the conveyer belt. He noticed that they were tagged for LaGuardia air-

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[1] The two other detectives left the area at this time. (Tr. 12).

port, to which a National flight was scheduled to depart at 12:40 P.M.[2] (Tr. 14-15).

It is at this time that a curious ballet begins. After looking at the luggage on the conveyer belt, Mr. McGavock followed defendant as he made his way to Concourse F. Suddenly, the defendant turned and started walking back in the direction from which he had just come. As the two passed, Mr. McGavock continued on to another counter where he stopped to observe defendant. As he watched, defendant strode back to the lobby from where he had just come and walked a complete circle around the area, looking back over his shoulder continuously. (Tr. 16-17). Defendant then made his way back toward Concourse F but stopped enroute to enter a men's restroom. (Tr. 17).

At that moment, Detective Facchiano rejoined Detective McGavock and told him that the name on the bags appeared to be Place. Not more than a minute passed before defendant came out of the restroom and began, once again, to make his way to Concourse F. The detectives followed and watched as defendant got into line to pass through the various security gates now common to all airports. (Tr. 18-19).

At this juncture, Detective Facchiano approached defendant and displayed his credentials. As he did so, Mr. McGavock met them and also displayed his credentials. A conversation ensued, the essentials of which, as testified to by Mr. McGavock, are reproduced here.

Detective Facchiano, in reply to defendant's question "was there anything wrong?" told defendant,

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[2] When the bags disappeared out of sight, Detective Facchiano left for the loading area to see if there were any names on the bags. (Tr. 16).

"Sir, we have a big problem with contraband going out of here in the airport." Upon hearing this, defendant broke out into a sweat. (Tr. 19). Mr. Facchiano continued, "Sir, I was wondering whether you might show us some identification and your airline ticket." In response, defendant handed his ticket to the detective and rummaged through his brown handbag for his driver's license. Both the airline ticket and the New Jersey driver's license identified the defendant as Raymond Place. (Tr. 19-21).

As the conversation continued, it was made clear by the detectives that the "contraband" mentioned earlier, was in fact, narcotics. Defendant responded to this information by stating "Well, I don't use any stuff like that." (Tr. 21). Mr. Facchiano then asked, "Well, sir, it's nothing that you have to do but would you mind if we looked inside your suitcase." Defendant gave his consent, adding that he didn't have anything in them. (Tr. 21-22).

The two detectives looked at each other and then at their watches. The time was 12:35; defendant's flight was to leave at 12:40. Mr. Facchiano turned to the defendant and said, "Well, that's all right. Have a nice flight, Mr. Place." (Tr. 22).

Had nothing else occurred, defendant Place would probably not be in front of this Court, but defendant, as he walked back toward the security gates, turned to the detectives and said something to the effect of "Hey, I knew you guys were cops when I saw you down in the lobby." When the detectives asked him how many he had spotted, the defendant replied, "Oh, four or five" and then left. (Tr. 22).

Detective McGavock then decided to look at defendant's baggage himself. He ran to the loading area and spotted the two bags on top of a cart. The name tags were apparently visible and on both of

them was the name R. Place. The addresses on the tags, however, differed: the smaller of the two bore the address 1885 South Ocean Drive, Hallandale, Florida; the larger one had 1865 South Ocean Drive in the same city. (Tr. 24-25).

Mr. McGavock's next step was to check with National Airlines for a callback number on defendant Place's reservation. Upon obtaining that number, Mr. McGavock called the Police Department in Hallandale and asked them to check to see if the addresses existed and to see to what address the callback number belonged. Hallandale police advised Mr. McGavock that neither of the addresses existed [3] and that the telephone number was that for 1980 South Ocean Drive, Hallandale. (Tr. 25-27).

After completing this check, Mr. McGavock decided to call Drug Enforcement Agency officials in New York. He talked to DEA Special Agent Gerard Whitmore and relayed to him his observations, a description of Mr. Place, and the flight number and its time of arrival. (Tr. 27-28). Specifically, Mr. McGavock described defendant's scanning activities, his nervousness, the discrepancies on the baggage identification tags, the conversation with Mr. Place and the fact that the addresses did not exist. (Tr. 27-29).

The scene shifted to New York's LaGuardia Airport where Special Agents Whitmore and Iglesias awaited the arrival of Place's flight from Miami. With the aid of Mr. McGavock's description, the two agents observed the defendant deplane. (Tr. 75-76). As described by Agent Whitmore, the defendant was

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[3] One of the addresses, 1865 South Ocean, did, in fact, exist but Mr. McGavock did not discover that until after the 17th. (Tr. 30).

trying to keep up with another male, attempting to converse with him, and, at the same time, looking about the baggage area. (Tr. 76). Furthermore, as defendant walked down the terminal, he constantly looked behind him, and, at one point, he stopped, looked at people at the next gate, and then looked behind and around himself. (Tr. 77).

Observing this behavior and fearing that he might flee if he spotted them, the agents chose not to follow the defendant but went directly to the National baggage claim area. Defendant eventually made his way to the same area but stood outside the actual pick-up location looking at every person in the area. (Tr. 77-78). When the luggage arrived, defendant Place walked into the area, claimed his bags, and after a few minutes deliberation left the area. (Tr. 78-79).

The ballet, begun in Florida, now resumed in New York. Agent Whitmore began to follow defendant who walked down a corridor and then abruptly stopped, turned around and looked straight at the agent. (Tr. 82). To avoid the appearance of "tailing" defendant, Agent Whitmore walked by him and into a stairwell. The defendant then resumed walking down the corridor, this time with Agent Iglesias not far behind. (Tr. 82).

The defendant made his way to the TWA baggage claim area where he put down his bags and used the telephone apparently to call a limousine. At this point, Agent Whitmore decided to approach the defendant; he took out his credentials and identified himself as a Federal narcotics agent. (Tr. 83).

Defendant immediately remarked, "I knew you guys were cops. I spotted him [Iglesias] as soon as I got out of the plane." (Tr. 83). Agent Whitmore

then informed defendant that the Dade County police had relayed some information about the defendant, and based on that and on Agent Iglesias' and his own observations Agent Whitmore said that he believed "There was a possibility that [defendant] was carrying narcotics." (Tr. 84).

After identifying the bags next to him as his own and asking the agents whether they actually believed he was carrying narcotics (to which Agent Whitmore said Yes), the defendant remarked that a gang of police surrounded him in Miami and searched his person and his bags and that he had been humiliated and embarrassed by these searches. (Tr. 84). The agents told defendant that their information was to the contrary to which defendant replied "I don't care what your understanding is my luggage and I were searched at the Miami Airport." (Tr. 85). After requesting and receiving defendant's airplane ticket and driver's license, (which Agent Iglesias took possession of in order to run a computer check on defendant), Agent Whitmore asked defendant to consent to a search of his luggage. Defendant apparently refused (Tr. 83) and was then told by Agent Whitmore that a search warrant would be sought to enable the agents to search his lugagge and that the agents would detain his bags until a Federal judge had determined whether or not such warrant should issue. In addition, defendant was told that he was free to go, that he was not under arrest, but that he could accompany the agents and his baggage to the judge. (Tr. 88-89). Defendant declined to do so but, when Agent Whitmore was the sole agent present, he twice asked Agent Whitmore if there was "some way that we could arrange for him to leave with his luggage." (Tr. 91, 94).

Although not without some hysterics on Mr. Place's part (Tr. 93-94), the agents left LaGuardia with the bags and proceeded to Kennedy Airport where they subjected the bags to a "sniff search" by "Honey", a trained police dog. "Honey", in sniffing defendant's bags which had been intermingled with other pieces of luggage, reacted positively to the smaller bag and ambiguously to the larger. (Tr. 98). The following Monday, August 20, 1979, the agents presented these facts to United States Magistrate John Caden who issued a search warrant for the smaller bag only. (Tr. 100). Agent Whitmore then proceeded, in the presence of two other DEA agents, to search the smaller bag and discovered therein approximately 1125 grams of cocaine, the evidence which defendant now seeks to suppress.

In support of this motion, defendant argues that his Fourth Amendment rights were violated by the Dade County officers when they questioned him at Miami International Airport. It therefore follows, defendant reasons, that the subsequent action taken by DEA officials was tainted by the illegality of that encounter. He also argues that the questioning in LaGuardia was illegal, that the "sniff search" was improper, and that therefore the search of the bag was unlawful. The Government, on the other hand, contends that the initial questioning was neither a stop nor a seizure within the purview of the Fourth Amendment, or, in the alternative, that even if there was a "stop", the Dade County officers had a "reasonable suspicion" based on objective and articulable facts and could therefore constitutionally "stop" defendant. They further contend that all of the other action taken by the DEA agents was proper and did not violate defendant's Fourth Amendment rights.

There has been a spate of recent decisions in this

Circuit concerning the validity of these so-called "airport stops," *see, e.g., United States* v. *Anparo Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980); *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *United States* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979); *United States* v. *Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States* v. *Price*, 599 F.2d 494 (2d Cir. 1979); but the starting point for any discussion of these encounters must be the Supreme Court decisions in *Reid* v. *Georgia*, —— U.S. ——, 100 S.Ct. 2952, 65 L.Ed.2d 890 (1980) (per curiam), and *United States* v. *Mendenhall*, —— U.S. ——, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).[4]

We begin with the *Mendenhall* decision for it is there that we find the most complete discussion, though not a satisfactory resolution, of the types of problems presented by this instant case. Briefly, the facts of that case are as follows: Ms. Mendenhall arrived in the Detroit Metropolitan Airport from Los Angeles, a "source city", was the last person to leave the plane, appeared very nervous, looked as if she were scanning the area to see if there were any agents about, carried no luggage, and changed airlines for her flight out of Detroit. Observing this behavior, DEA agents approached Ms. Mendenhall and asked to see some identification and her airline

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[4] One panel of the Second Circuit has suggested, in dicta, that *Mendenhall* does not control in these types of cases *on the issue of reasonableness* because it has no majority opinion. On that issue, *see United States* v. *Anparo Forero-Rincon*, *supra*, note 3. The *Reid* v. *Georgia* opinion, which was issued after the *Forero-Rincon* opinion does, however, have a majority ruling on the issue of reasonableness. In any event, this Court believes that the approaches suggested by the Supreme Court decisions are to be given much credit, even in the absence of a majority opinion in *Mendenhall*.

ticket. After examining both and finding discrepancies therein, the agents asked her to accompany them to the DEA office for further questions. She apparently acceded to this request and went to the office with the agents where she consented to a search of her person by a policewoman. This search produced the two packets of heroin that Ms. Mendenhall later sought to suppress. *United States* v. *Mendenhall*, —— U.S. ——, 100 S.Ct. at 1873-74.

In considering the validity of the initial encounter, the majority of the Supreme Court split along two lines. Justice Stewart, joined by Justice Rehnquist, found that this encounter was not a "stop" or "seizure" governed by the Fourth Amendment because Ms. Mendenhall's freedom of movement was not restrained. The test postulated for gauging whether there was such a restraint is essentially one of reasonableness; it is a stop, governed by the Fourth Amendment "if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 1877. Justice Stewart continued his discussion by stating "In the absence of some such evidence [of offensive or threatening police conduct], otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.*

Justice Powell, with whom the Chief Justice and Justice Blackman concurred, did not consider the question of whether this was a "stop" or a "seizure" governed by the Fourth Amendment because he believed that that issue was not raised properly in the *Mendenhall* case. Instead, he considered the facts and legal issues to be within the ambit of the rule announced in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889 (1968). The *Terry Rule* establishes that "a reasonable investigative stop does not [violate] the Fourth Amendment." *United States* v. *Mendenhall*, —— U.S. ——, 100 S.Ct. at 1881. The reasonableness of a stop depends upon the facts of each case and, in particular, (i) the public interest served by the stop, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officials relied in light of his knowledge and expertise. *Id. See also, Brown* v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States* v. *Vasquez, supra; United States* v. *Price, supra.*

In addition, our own Circuit has enumerated the criteria by which to evaluate these "airport stops" as follows:

> "(1) . . . these stops will be deemed reasonable, and therefore constitutional even though warrantless, so long as they are minimally intrusive upon the detained traveler and are initiated only after the agent has observed specific and articulable facts to support a suspicion that the traveler is engaging in criminal activity and that the stop is immediately necessary, *United States* v. *Vasquez*, 612 F.2d 1338 (2d Cir. 1979), and (2) that the reasonableness of the agent's suspicion must be judged upon the particular facts of each case, *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980)."

*U.S.* v. *Forero-Rincon*, Slip Op. at 219. (This approach naturally assumes that the "stop" is governed by the Fourth Amendment, a situation which may or may not exist in the instant case.)

With the foregoing as our guide, we examine the facts of this case.

Defendant was approached in Miami International Airport by two detectives who, according to the testimony which we credit, displayed their credentials and politely asked defendant to produce some form of identification and his airline ticket. Defendant did so. There is no evidence that the detectives used physical restraint in any form whatsoever; there is no evidence of any offensive contact; there is no evidence of any threatening gestures; and there is no evidence of any form of menacing whatsoever. *See U.S.* v. *Mendenhall, supra,* 100 S.Ct. at 1877. Moreover, the questions posed to defendant were prefaced by "Sir" and there were few, if any, imperative statements made by the detectives. The entire encounter was marked by civil and polite behavior on the part of the detectives who apparently took great care in their handling of the defendant. In addition, the encounter took place in a busy public area where the defendant could feel relatively safe that the police would not abuse him. *Compare Delaware* v. *Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

In light of all of the circumstances surrounding the incident, we conclude that a reasonable person would have believed that he was free to leave. In fact, defendant was free to leave and did so. In holding that the questioning does not fall within the ambit of the Fourth Amendment, we echo Justice Stewart's statement that:

> "The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that a person

> asking the questions was a law enforcement official. *See Terry* v. *Ohio, supra*, 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring)."

*United States* v. *Mendenhall, supra*, 100 S.Ct. at 1877.

The recent Fifth Circuit Court of Appeals decision in *United States* v. *Fry*, 622 F.2d 1218 (5th Cir. 1980) (per curiam), further supports our holding that there was no seizure or stop. In that case, the DEA agent, whose attention had been attracted by the odd behavior of a pair of individuals walking through the airport, sat down next to these individuals, discretely identified himself, and asked if he could speak to them for a few moments. He then requested some form of identification, and when one of the individuals gave what he considered to be evasive answers to that request, he then asked the men if they would allow a search of their persons and of their luggage. Holding that there was no stop governed by the Fourth Amendment, the Fifth Circuit panel wrote

> "Here, as in *Mendenhall*, the DEA agent merely approached Fry and Gadsden, identified himself, and asked if he could speak with them, a request they granted. Thus, following Justices Stewart and Rehnquist, 'on the facts of this case, no "seizure" of the respondent occurred.' " *Id.*

*See also, People* v. *Guzman*, 108 Cal.App.3d 601, 166 Cal.Rptr. 633 (1980) ("the Fourth Amendment prohibits unreasonable seizures, not eye contacts and greetings.").

This Court understands that our own Circuit has not yet adopted the approach we have just taken, but

absent indication to the contrary, we believe, as do at least two Justices on the Supreme Court, that this approach is in keeping with the letter and the spirit of the Fourth Amendment as well as the holdings of recent Appellate Court decisions. However, because the state of the law is so uncertain and because our Circuit has not yet adopted the approach we have taken, we proceed in the alternative to examine the facts to determine whether or not there were objective and articulable facts upon which the agents could have based a reasonable suspicion that defendant was engaged in illegal activity.[5]

In determining whether the facts and inferences derived therefrom support a reasonable suspicion, we are guided by the three criteria set out by the Second Circuit in *United States* v. *Forero-Rincon*, *supra*, Slip Op. at 221. First, the Dade County detectives' observations must be viewed as a whole, not as discrete and separate facts. Second, the observations must also be viewed through the eyes of an agent who is trained and experienced in discerning in ostensibly innocuous behavior indicia of narcotics trafficking. Third, the fact that conduct is as consistent with innocence as it is with guilt does not preclude that conduct from supporting a reasonable suspicion of criminal activity.

Detective McGavock's suspicion was based upon the following facts:

1. Defendant Place was departing from a "source city."

2. Defendant systematically scanned the immediate area in the lobby in which he was stand-

---

[5] Proceeding in the alternative in these types of cases was also adopted recently by the Fifth Circuit. *See United States* v. *Fry*, *supra*.

ing and looked very closely at each person that was seated or standing in that area.

3. Defendant noticed and paid close attention to Mr. McGavock when he left the line.

4. Detective stared directly at the detectives two or three times as the detectives moved around the lobby.

5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby once again.

6. Defendant paid for his ticket in cash.

7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed.

This odd, if not bizarre, behavior, speaks for itself. It is certainly not normal conduct to do what defendant did in the Miami International Airport. And while the behavior itself may not be guilty behavior, the third criteria of the test outlined above indicates that it need not be so.

Viewed as a whole and through the eyes of an experienced agent, we believe that defendant Place's conduct could easily have given rise to a reasonable suspicion that some illegal activity was afoot. Defendant's behavior certainly did serve to make himself distinguishable from the rest of the crowd milling around about at the airport. His behavior was not merely the odd behavior of an eccentric; nor was

it the normal behavior of an every day airline traveler. Furthermore, the recent Supreme Court decision in *Reid* v. *Georgia, supra,* does not militate against our finding in this case that there was reasonable suspicion to justify the stop. In that case the only suspicious conduct exhibited by the defendant was that he preceded another person and occasionally looked backward at him as they proceeded through the airport. The Supreme Court held, as a matter of law, that this conduct could not give rise to a reasonable suspicion, characterizing it as "simply too slender a reed to support the seizure in this case." *Id.,* 100 S.Ct. at 2754.

In the instant case, we have found at least eight objective and articulable facts upon which a reasonable suspicion could be based. This Court believes that the facts of the case now before us are easily distinguishable from the facts in *Reid* v. *Georgia*; and, as our own Circuit has indicated, "the reasonableness of the agent's suspicion must be judged on particular facts of each case, *United States* v. *Buenaventura-Ariza,* 615 F.2d 29 (2d Cir. 1980)." *United States* v. *Forero-Rincon, supra,* Slip Op. at 220. Therefore, we hold that the Dade County detectives' suspicion was reasonable because it was based on objective and articulable facts and that the stop, if it can be characterized as such, was therefore valid. *See id.; United States* v. *Vasquez, supra; United States* v. *Vasquez-Santiago,* 602 F.2d 1669 (2d Cir. 1979); *United States* v. *Price, supra; United States* v. *Rico, supra; see also United States* v. *Fry, supra; United States* v. *Klein,* 626 F.2d 22 (7th Cir. 1980).

Having established the validity of the encounter in Miami International Airport, we now turn to the events which transpired later the same day in La-

Guardia Airport where Special Agents Whitmore and Iglesias awaited defendant's arrival. As the above recitation of facts indicates, these agents observed defendant's behavior before they approached him for questioning. It should also be noted that these agents were in possession of the information communicated to them by the Dade County detectives. That information included not only the observations made prior to the encounter in Miami International Airport but also a report of the defendant's behavior during that encounter, the defendant's parting remarks, the fact that the addresses listed on defendant's baggage were (i) not the same address and (ii) apparently did not exist, and that the callback number was located at even yet a third address.

As to this encounter, we reiterate our conclusion that the Fourth Amendment does not prohibit law enforcement officials from questioning private citizens as long as that private citizen reasonably believes that he is free to end the conversation and leave at any time. Consequently, we believe that Special Agents Whitmore and Iglesias could have approached and questioned defendant even if they did not have a reasonable suspicion that he was engaged in criminal activity. *See United States* v. *Mendenhall, supra* (Stewart, J.).

Nevertheless, this encounter became a stop when Detective Iglesias took possession of defendant's driver's license and when Detective Whitmore took possession of defendant's baggage. While this was not an actual restraining of the person of the defendant, we believe that such conduct on the part of the agents went beyond the mere questioning of a citizen to a type of police action that must be justified by more than a desire to investigate. We will discuss the validity of the detention, *infra*, but for

now, suffice it to say that the detention of the personal belongings of an individual questioned by the police is also a detention of that person. Such conduct, we believe, would lead a reasonable person to believe that he was not free to end the conversation and leave, but rather was being subjected to police domination and subservient thereto. This encounter thus became a stop and must perforce be based upon objective and articulable facts which must have given rise to a reasonable suspicion that defendant was engaged in illegal activity.

As indicated above, there were ample facts upon which a reasonable suspicion could be based to justify the encounter in Miami International Airport. These facts, listed above, were also communicated to Special Agent Whitmore and we shall not reiterate those facts here. We shall list, however, those additional facts which Special Agents Whitmore and Iglesias relied upon in making the stop of defendant in LaGuardia Airport:

1. Defendant Place broke out into a sweat when asked about narcotics by Detective McGavock and Facchiano in Miami International Airport.

2. Defendant Place's parting remark to the same detectives that he had spotted them in the lobby.

3. The discrepancy between the addresses listed on the identification tags attached to defendant's baggage.

4. The fact that neither of those addresses were known to exist.[6]

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[6] It is unclear from the testimony taken at the suppression hearing whether or not Mr. McGavock told Agent Whitmore that the callback number was located at still a third address.

5. Defendant's scanning activity in LaGuardia Airport.

6. Defendant's nervous behavior and conduct in LaGuardia Airport.

7. Defendant's spontaneous remark on being approached by the special agents that "I knew you guys were cops. I spotted him as soon as I got out of the plane." (Tr. 83).

These facts, taken together with those facts communicated to Agent Whitmore by the Dade County authorities, easily support a finding that the stopping of defendant by Special Agents Whitmore and Iglesias was based upon a reasonable suspicion supported by objective and articulable facts. We do not repeat here what we stated above about defendant's behavior. We only note that this is not the conduct of the everyday traveler and that, in fact, the agents would have been remiss had they not investigated this conduct further.

Defendant's third argument in support of the suppression of the evidence obtained by the search of his bags pursuant to the Magistrate's warrant is that the detention of the suitcase by Agent Whitmore violated his Fourth Amendment rights. Defendant contends that such a seizure must take place pursuant to a warrant or upon a showing that probable cause existed at the time of seizure. This question, at least according to our research, is a novel one in our Circuit. However, we have the benefit of a recent Seventh Circuit Court of Appeals opinion which addressed a strikingly similar factual situation.

In *United States* v. *Klein*, *supra*, at 25, the Seventh Circuit held that the mere detention of a person's baggage may be supported by a reasonable sus-

picion that the bags contained contraband. Because it is instructive to do so, we quote from that decision extensively:

> Nevertheless, we are left with the important question whether probable cause was necessary to *detain* the suitcases, given the fact that no probable cause existed at that point to *search* the suitcases. As mentioned above, in *Terry* v. *Ohio*, 392 U.S. 1, [92 S.Ct. 1921] (1968), the Supreme Court sanctioned the detention of individuals for further investigation when a police officer had reasonable suspicion to believe something unlawful was afoot. Our research has uncovered no case in which a court has confronted a detention situation precisely like the one before us now, but the Supreme Court did address an analogous situation in *U.S.* v. *Van Leeuwen*, 397 U.S. 249, [90 S.Ct. 1029, 25 L.Ed.2d 282] (1970), where it extended the *Terry* logic to the detention of parcels of mail believed to contain contraband.
>
> In *Van Leeuwen*, a postal clerk received for first-class mailing two packages, each weighing twelve pounds, with one addressed to a post-office box in Van Nuys, California and the other to a post-office box in Nashville, Tennessee. Each package was registered and insured for $10,000 and was to be sent airmail. The postal clerk found all these facts suspicious and voiced his suspicions to a policeman who happened to be present. The policeman then noticed that the return address on each package was that of a vacant housing area and that the person who had mailed the packages was driving a car with Canadian license plates.

Because of these suspicious facts, the police detained the packages pending further investigation. By the next day, there was information sufficient to establish probable cause for issuance of a search warrant; a search warrant was obtained, the packages were opened, inspected, resealed and sent on their way.

Recognizing that the parcels in question were first-class mail and therefore free from postal inspection except in accordance with the Fourth Amendment. 397 U.S. at 251, [90 S.Ct. at 1031], the Court nevertheless held that the detention pending further investigation of the packages in that case was justified:

> The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town certainly justified detention, without a warrant, while an investigation was made. . . . The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically—and it is theory only that respondent has on his side—detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment. Detention for 1½ hours—from 1:30 p. m. to 3 p. m.—for an investigation certainly was not excessive; and at the end of that time probable cause

> existed for believing that the California package was part of an illicit project.

397 U.S. at 252, [90 S.Ct. at 1032].

By the same token, we hold that the detention of the suitcases pending further investigation in this case was not an unreasonable seizure. We are cognizant of the possible difference between the privacy interest in packages surrendered in the mails and that in luggage carried by an individual. However, in this case we believe that defendants' privacy interest in their luggage was adequately protected. In *Arkansas* v. *Sanders*, 442 U.S. 753, [99 S.Ct. 2586, 61 L.Ed.2d 235] (1979), the Supreme Court elaborated on the scope of an individual's privacy interest in his luggage:

> One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. . . . [T]he very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.

442 U.S. at 764, [99 S.Ct. at 2593] [footnote omitted].

In a similar vein, the Court in *Van Leeuwen* recognized the great privacy interest in the contents of first-class mail, stating that " 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' " *Van Leeuwen, supra*, 397 U.S. at 251, [90 S.Ct. at 1032], quoting from *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 437, [41 S.Ct. 352, 65 L.Ed. 704] (Holmes, J., dissenting). The Court went on to say that

> [n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

397 U.S. at 253, [90 S.Ct. at 1032]. *By the same token, defendants' privacy interest in the contents of their suitcases in this case "was not disturbed or invaded until the approval of the magistrate was obtained."*

We hold that at the time they decided to detain the bags while waiting for a canine trained in drug detection, the DEA agents had reasonable suspicion to believe that the bags contained contraband; they would have been remiss in not detaining the bags for further investigation. (Emphasis added).

*Id.* at 25-26.

We are not faced with a taking into custody of a person which must be supported by probable cause. *See Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). We are not faced with an actual search which also must be based on probable cause. We are faced with a detention of luggage. If detention of a person can be had based on a reasonable suspicion, see *Terry* v. *Ohio*, *supra*, there is no reason why detention of physical items cannot be based on the same standard. Consequently, we agree with the Seventh Circuit's reasoning that detention of the bags in this case need only be based

upon a reasonable suspicion.[7] The facts delineated above, as well as the defendant's behavior during the questioning, were sufficient to raise in the agents mind a reasonable suspicion to believe that the bags contained narcotics. We therefore hold that defendant's Fourth Amendment rights were not violated by the detention of the bags by the DEA agents.

Defendant's final argument in support of his suppression is that his Fourth Amendment rights were violated when his two suitcases were subjected to sniff searches by the police dog named Honey. Defendant does not contest the validity of sniff searches *per se*, but rather asserts that this particular search was "carried out under such circumstances reasonably calculated to achieve a tainted reaction from the dog." We have reviewed the testimony taken at the suppression hearing and find nothing to support defendant's claim. The bags were presented to the dog one at a time, along with twenty or thirty other parcels. The dog gave a positive reaction to the smaller bag and an ambiguous reaction to the larger bag. There is nothing in the record to suggest that the reaction was contrived by the agents or by the dog handler. We therefore deny defendant's motion on this ground.

On the basis of the foregoing, we deny defendant Raymond Place's motion to suppress the evidence seized from him on August 17, 1979.

SO ORDERED.

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[7] Should, however, it be determined that a detention of luggage must be based on probable cause we note here that in our opinion there was probable cause in this case to detain the bags. Because of the Seventh Circuit opinion and our agreement therewith, we need not pass on that question; but were we called upon to do so we would hold that there was.

## APPENDIX E

## SUPREME COURT OF THE UNITED STATES

No. A-642

UNITED STATES, PETITIONER

*v.*

RAYMOND J. PLACE

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of January, 1982.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 365599 781

No. 81-1617

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RAYMOND J. PLACE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## JOINT APPENDIX

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FITZGERALD, TAYLOR & ZWICKY
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*Petition for certiorari filed March 1, 1982*
*Certiorari Granted June 7, 1982*

# In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1617

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAYMOND J. PLACE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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# UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF NEW YORK

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No. 79-CR-584

UNITED STATES OF AMERICA

v.

RAYMOND J. PLACE

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## RELEVANT DOCKET ENTRIES

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| DATE | FILINGS—PROCEEDINGS |
|---|---|

1979

Sept. 28 Rec'd papers from Southern District of Florida. Deft surrendered voluntarily on 8-28-79. Deft arraigned at Southern District of Florida. Papers on file (ir)

Nov. 1 Indictment filed.

Nov. 9 Before PLATT, J—case called—Deft & atty Jim Clark present—Deft waives reading of indictment & enters a plea of not guilty—adjd to Nov 23 at 11:30 am for motions or at 10 am to set a date for trial. Bail contd ($25,000 PRB). Local counsel to file Notice of appearance by 11-16-79.

Nov. 29 Motion to suppress evidence filed (forwarded to Chambers) and Defts Memo of Law filed supporting motion to suppress.

Dec. 27 Before Platt, J. Case called. Deft & counsel present. Hearing on Defts motion to suppress Order & Begun. Hearing concluded. Decision reserved. Briefing schedule made contingent on date of decision on Mendenhall. After having been advised of his rights by the Court & on his own behalf, Deft waives speedy trial rights. Court makes findings under T-18 USC 3161(h)(8). Bail contd.

1980

Sept. 30 By Platt, J. Order dtd 9-29-80 that on the basis of the foregoing, we deny defendant Raymond Place's Motion to suppress the evidence seized from him on August 17, 1979 filed. Copies mailed.

Nov. 14 Before Platt, J. Case called. Deft & counsel present. After having been advised of his rights by the Court & on his own behalf, Deft withdraws his plea of not guilty heretofore interposed, & enters a plea of guilty to the Indictment, reserving, on consent of the Govt, his right to appeal from denial of motion to suppress. Sentencing adjd w/o date. Bail contd.

1981

Jan. 9 Before PLATT, J.—Case called. Deft & Counsel present. Gov't present. Deft is hereby committed to the custody of the Atty. General o[r] his authorized representative for imprisonment for a term of 3 yrs. Deft is eligible for parole under T. 18, USC, 4205(b)(2). Deft is also to serve a Special Parole Term of 10 yrs. upon his release from confinement. Deft is also to pay a fine of $5,000.

Jan. 16 Notice of Appeal, filed. Copy of Notice & Docket Entries forwarded to CofA w/Form A. Attys. notified.

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

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No. 81-1034

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

v.

RAYMOND J. PLACE
DEFENDANT-APPELLANT

---

## RELEVANT DOCKET ENTRIES

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| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1981 | |
| Feb. 19 | Record on appeal filed—original papers of district court. |
| Sept. 16 | Judgment reversed by published signed opinion, filed (Mansfield, CJ) |
| Sept. 16 | Concurring in a separate opinion, filed (Oakes, CJ) |
| Sept. 16 | Dissenting in a separate opinion, filed (Kaufman, CJ) |
| Sept. 16 | Judgment filed (and corrected copy) |

Nov. 2 Appellee U.S.A. petition for rehearing with suggestion for rehearing en banc, filed (w/pfs)

Nov. 30 Order denied appellee U.S.A. petition for rehearing with suggestion for rehearing en banc filed (Filed 1:00 p.m.)

1982

Jan. 8 Mandate issued (judgment and opinion)

**Relevant Portions of Trial Transcript**
**Direct Examination of Gerard Whitmore**

[87]

By Mr. Wallance:

Q. Thank you.

Would you please continue.

A. Yes, sir.

After receiving the defendant's Place's ID and ticket receipt, he made a statement to me, why were we stopping him; that, again, he was traveling in his right name.

I told him I was requesting a voluntary search of his luggage because I was under the belief that he was carrying narcotics in his bags.

I told him—he asked me, could we search his bags before I could inform him of his rights.

And I told him, no, we could not search his bags [88] because the under the Fourth Amendment of the Constitution he had certain rights and we could not search his bags without a warrant, unless he permitted us and volunteered to such a search.

Mr. Place wanted to know if he was under arrest.

I informed him he was not under arrest and that he was free to leave.

He then wanted to know if he could take his luggage from the airport.

And I informed the defendant we were going to take the luggage to a neutral party, to a Federal Judge, to make a determination as to whether or not there was probable cause for a search warrant.

At this point Agent Iglesias took the driver's license provided to me by the defendant Place, and went to make a phone call that he was going to check in—

Q. One moment.

In returning to your conversation with the defendant, did you discuss whether or not the defendant could accompany the suitcases?

A. Yes, sir, I did.

Q. What exactly did you say to the defendant?

A. He wanted to know if we could take his luggage.

[89] And I said, "No, we would not open it or search it. We would bring it to a Federal Judge and he would make the determination of whether we could search it or not. If he would not grant us a search warrant, we would return it to Mr. Place, and on the condition we would in no circumstances, under no circumstances violate his rights and search him or his luggage.

I told him he was free to accompany us to go to a Federal Judge.

And the defendant Place told us he had no time, that he had pressing engagements, and he could not accompany us with the suitcases.

Q. Agent Whitmore, at that point did you believe there were narcotics in that suitcase, in those suitcases?

A. Yes, sir.

Q. What was the basis of the belief?

A. First that the defendant had attracted himself to the attention of the police officers in Miami, Florida and he had, as Detective McGavock told me, when interviewed, broken into a cold sweat and kind of stuttered in his speech; that when he came off the airport under my direct observation I observed that he was coming off with another male, apparently, or [90] engaged in conversation, while trying to look about the airport and keep up with this male; that his constant walking down the corridor with his other person, he constantly looked behind himself, appeared to be with this other person, and tried to keep up with him, while the other person was maintaining a constant walking pace. And while he walked with

the other passengers from the National flight, he did not follow the passengers down to the baggage claim area. While all the passengers were coming down the escalator, the normal route from National, the defendant Place had somehow gone down to TWA and come back a different route.

And while he was approaching the National baggage area, he was looking behind himself for no apparent reason. And before he entered the baggage claim area, he stood outside and kept looking about the area. And after he entered the area he was constantly scanning the area again. And after picking up his luggage, the two pieces, before immediately proceeding out, he stood there, looked about, and then came out.

And while he was walking to the TWA area, that he had stopped on at least two occasions, once stopping dead in his tracks, turning around looking at me, and [91] the second time when he was turning the corner.

I found in my mind that these were not the actions of an innocent person.

Q. Thank you.

Would you please continue describing your observations at the airport.

A. I recall Agent Iglesias had just come back from the NCIC check. And I think this is where I dropped off.

Q. Returning to the point where Agent Iglesias went to make the NCIC check.

A. Yes, sir.

At that point where Agent Iglesias left, the defendant Place turned closer to me and in a low voice he asked if there was some way that we could arrange for him to leave with his luggage. And again, I explained to him the whole procedure, that in a case where an agent believes that a person is carrying narcotics, that we have to go to a

Judge who would either issue a warrant or allow the luggage to go free.

And the defendant wanted to know, isn't there anything else we can do. And I told him there was not.

Q. Did you say anything else to the defendant about his suitcases?

[92] A. My next recollection is that Agent Iglesias came back from the NCIC, and he pointed at the bags and he said, "Everything is okay." And he wanted to know, "Mr. Place, are these your pieces of luggage or aren't they your pieces of luggage?"

The defendant Place at this time looked at the luggage, looked at us, again looked down, and looked at the bigger piece and he said, "This is my piece of luggage. It has my name and address on it."

He said, "The other bag, it looks like my bag," but he said, "It doesn't have my name on it and it had my name on it in Miami."

He said, "I don't know what is going on here, but this is my piece of luggage and this is not my piece of luggage."

And I said, "Wait a minute. Is it or isn't it?"

And he said, "Wait a minute. I am not saying it is my piece of luggage or it's not my piece of luggage."

At which time Agent Iglesias and I kind of stymied as to whether it was or it wasn't. And I asked him again, "Do you know the combination to these bags?"

At which time the defendant Place said, "Yes, I know the combinations, but why do you need to know them?"

And I explained to him if we were granted a [93] search warrant that we wanted to open his bag without damaging the locks. And I told him under no circumstances would we open the bags unless we had a search warrant.

The defendant Place stated tht he would not provide us with the combinations and that he was going to call his lawyer about this matter.

Q. At that point what happened?

A. At that point I picked up the bags—I'm sorry, Agent Iglesias picked up the bags, and I on a piece of paper told Mr. Place, "This is my name, this is my office telephone number and this is a 24 emergency, 24 hour emergency telephone number where I can be reached by your attorney or yourself to pick up this luggage."

Mr. Place had not given me any address where he would be going except for the driver's license. He said he would contact me or his attorney would contact me about picking up the luggage.

Agent Iglesias walking outside when Mr. Place, in a loud voice, ran after him and began, "You, I want your name. I want your badge number. I want to know who you are."

Agent Iglesias, having the bags in each one of [94] his hands informed the defendant first not to yell at him, take his hands out of his, Agent Iglesias' face, and then Agent Iglesias gave him his name and told him he could reach him at the same telephone numbers I had given him.

Agent Iglesias told me he was going to check the National baggage claim area for the other identification stub which was missing from the small bag. And I went out to my government car, which was parked across the street, and began to place the bags in the trunk of the vehicle. I could only place one bag in the trunk. While I was maneuvering, the defendant Place came over to me and he had asked me, "Can't we fix things up that I can leave with my luggage at this point?"

And I told him that there was no way, that these bags would have to be taken to the District Court and we were going to apply for a search warrant.

A few minutes later Agent Iglesias came back and we departed LaGuardia Airport.

Q. Agent Whitmore, I show you what has been marked for identification as Government's Exhibit 3 and 4.

(Handed to the witness.)

[95] Q. Do you recognize these exhibits?

A. Yes, sir, I do.

Q. How are you able to recognize them? Step down if you have to.

(The witness steps down from the witness stand.)

A. The smaller bag has an evidence sticker on it.

Q. This is the exhibit marked what?

A. Governent's Exhibit 3, which has my signature, Agent Sears' signature, the date 8-20-79, at which time we had opened the bag up pursuant to a search warrant.

The bag marked D—

Q. I'm sorry, the exhibit marked what?

A. Government's 4 is the same bag with the name Place on it, with the 1865 South Ocean, Hallandale, Florida.

Q. Are both exhibits in the same condition as they were at the time you took them from the defendant:

A. Yes, sir.

They appear to be the same except for the evidence sticker.

MR. WALLANCE: I offer Exhibits 3 and 4

[96] MR. CLARK: No objection, your honor.

THE CLERK: Government's Exhibit 3 and 4, suitcases, marked in evidence for the hearing.

Q. Agent Whitmore, with regard to Exhibit 3, the smaller suitcase, is this the classic identification tag that was on the suitcase at the time that you took it from the defendant?

A. Yes, sir, it is.

Q. And at that time there was no address label on the bag?

A. No, sir, there was not.

Q. Thank you.

Would you please continue from the point where you left the airport.

A. Yes, sir.

Agent Iglesias and I got into the Government car and we proceeded to Kennedy Airport, to the dog handler's office at the mail facility.

Q. Pardon me.

At approximately what time did you leave LaGuardia Airport?

A. It was approximately ten after four.

Q. Continue, please.

A. And we proceeded to the Customs dog handler's [97] location at the mail facility. We arrived there approximately 35 minutes later due to the heavy traffic that afternoon. It was, as I recall, a Friday afternoon.

And when we got to that location the dog handler was not there, but the dog was there.

We then made some telephone calls and got the dog handler dispatched to our location. A dog handler by the name of Donald Hughes (phonetic spelling) appeared at the scene.

I explained to him what the situation was and that we wanted the dog to—wanted these bags to be passed before the dog to find out whether there was an indication of a controlled substance inside the bags.

Q. Do you know the name of the dog?

A. Yes, sir, I do. The dog's name is Honey.

Q. Are you familiar with Honey's prior reputation for detecting narcotics inside of suitcases?

Q. Yes, sir. I used Honey myself in the past and it has a very successful rate of finding substances at the mail facility at Kennedy Airport.

Q. Please explain how the suitcases were submitted to Honey.

A. Yes, sir.

[98] The bags were submitted one at a time to the dog in the presence of 20 or 30 parcels, the dog not being able to differentiate between shape and size and texture of what is presented to it, only by the scent, and this is my understanding.

When the small bag appeared in the presence with other luggage, the dog walked up and down in front of the bag. And I was informed then by the dog handler that reaction to the suitcase was positive.

The larger suitcase was presented with the parcels and the dog walked up and down, and I was informed by the dog handler that the reaction was neither—was not a positive reaction, but yet he couldn't term it a negative reaction because the dog had given some sort of reaction which he explained to me is possible contamination through handling possibly from someone who handled narcotics.

Q. When you say the dog's reaction was positive to the smaller suitcase, what does that indicate?

A. It indicates there was a positive reaction for the presence of a controlled substance within that suitcase, as I understand it.

Q. At approximately what time did the dog react to the suitcase marked Government's Exhibit [99] number 3?

A. As I recall, it was about 5:30 or 5:40 in the evening.

Q. Were the suitcases opened during this procedure?

A. No, sir, not at all.

Q. Were they tampered with in any way?

A. No sir, not at all.

[100] Q. And what did you do after that?

A. Immediately upon learning from the dog handler that there was a positive reaction from the small suitcase, I contacted the U.S. Attorney's Office here and asked

them which method they wanted me to proceed on, and they told me to come in on Monday and apply for a search warrant.

Q. Continue, please.

A. Agent Iglesias and I secured the two pieces of luggage in our office. And on Monday morning Agent Iglesias came to the Eastern District and applied for a search warrant. It was granted later that afternoon for the small bag only.

Q. By which you mean the suitcase marked as Government's Exhibit 3?

A. Yes, sir.

Q. Continue.

A. A search warrant was granted by Magistrate Caden for the smaller suitcase. And I was informed then by Agent Iglesias—of that by Agent Iglesias on the telephone. And I opened the small bag then at the airport in the presence of Agent Sears and Agent Quick, Donald Aaron Quick.

When I opened the bags I put on some plastic [101] gloves because we were trying not to touch this and gather whatever fingerprints we could in the case. I extracted the exhibits, a large bag of narcotics, a small bag of narcotics, a small bag of marijuana, and inside a chapstick type of a lip, whatever you call it, lip moisturizer, we took that apart and found a small vial of green tabs, which the lab revealed was LSD.

Q. And you are familiar with the report of the laboratory regarding the items found in the suitcases?

A. Yes, sir.

Q. And what did that report indicate?

A. The report as I recall indicated that the bags of cocaine, one was approximately a little more than a kilo and one, as I recall, was about an eighth of a kilo, which is 250 grams—125 grams, I'm sorry. It was approximately

between what I recall as 60 and 80 percent cocaine; and that the vegetable matter field tested positively for marijuana and was, in fact, marijuana. The tabs found in that chapstick lip moisturizer were taken apart and the vial found in there I think had 20 or 25 LSD tabs.

* * * * *

[125]

**Cross-Examination of Gerard Whitmore**
**By Mr. Clark:**

Q. When did you first make personal contact with the defendant?

A. After he came back from the telephone conversations he had. He went over to his bags and he stood there and he was walking over outside. And I indicated to Agent Iglesias that he was going to interview him at this time. And I proceeded to walk over to the defendant Place with my credentials, identifying myself as a Federal narcotics officer.

[126] Q. Wasn't the true cause for this particular interview to see if consent could be obtained to look at these two suitcases?

A. One of the reasons was to see—to find out what his reason was for the way he reacted.

Q. Isn't it true that the reason you made this particular interview is because you wanted the defendant to consent to the search of his two suitcases?

A. At which point are you speaking about?

Q. I am speaking about when you first talked to him before then. Didn't you want him to consent for you to be able to look at those two suitcases?

A. I would have to answer that the initial stop was not to search the bag.

Q. All right.

What was the first question you asked him?

A. Well, after the episode where he started, "I knew you guys were cops, and I spotted him," and pointing to Agent Iglesias—

Q. What was the first question you asked him?

A. The first question asked was asked by Agent Iglesias as to whether the luggage was his.

Q. And he said yes; isn't that correct?

A. Yes, sir.

[127] Q. And what was the next question that either you or Agent Iglesias asked him?

A. I recall the next thing being the request for identification and airline ticket.

Q. So, although the purpose of the interview was to have him explain his suspicious activity, at least suspicious in your mind, that was not the initial question, was it? You asked him what his name was and to produce identification, and you already knew that, didn't you?

A. He could have given me another different name.

Q. You asked him if these bags were his?

A. Yes.

Q. And he said yes.

When was the first question, if any, you ever asked him as far as explaining his scanning the area? You didn't ask him why he was scanning the area, did you?

A. No, sir.

Q. But that was why you were going to interview him; isn't that right?

A. Yes, sir, that's correct.

Q. Now, eventually you seized these two bags from his possession; isn't that right?

[128] A. We took the bags to apply for a search warrant.

Q. Did you have a problem with me using the word "seize" as opposed to "took"?

A. In my mind a seizure is under Government control. And a seizure in my mind would have been, would be where the contents of the suitcases would not be returned to him.

Q. After you took these two bags or seized them, they were in Government control, weren't they?

A. Yes, sir.

Q. So it fits your definition of seizing them, doesn't it?

A. Yes. But a Judge could have told us to return it to him and they would have been returned.

Q. But that's pure speculation at that time, wasn't it?

A. It was speculative, but he was free to find out as to whether we were going to a Judge or, in fact, if the Judge would give him back his property.

Q. When you seized these two bags, you did not have a warrant, did you?

A. No, sir, I did not.

Q. When you seized these two bags you did not [129] make a voiced formal arrest of him, did you?

A. No, sir.

Q. And when you seized these two bags, the defendant did not consent to that seizure, did he?

A. The answer is—

Q. He couldn't do anything about it, could he?

A. He could have come with us.

Q. You were going to take the bags, regardless of whether he came with you or not; isn't that correct?

A. At one point, after the statements were made, I felt that there were narcotics in the suitcase—

Q. The time you seized the bags you were going to take the bags whether he came with you or not; isn't that correct?

A. Yes, sir.

Q. Now, after the two bags were taken into the possession, custody and control of you and Agent Iglesias, they were then transported to where?

A. To JFK Airport.

Q. Okay.

And was it at that point in time where a dog handler was attempted to be contacted and notified?

A. Yes, sir.

Q. And it's at that point in time that the dog [130] was available but the handler was not?

A. Yes, sir.

Q. Where were the bags located when the dog and the handler eventually made the inspection or sniff?

A. The dogs were brought into a Customs examination area within the U.S. mail facility at JFK International Airport. And they were placed on a conveyor belt along with other parcels, one bag at a time.

Q. That's the second time you used the word "parcels." Isn't it true you were within a mail area and these were the only two suitcases and, indeed, the other items were parcels?

A. Yes, that's a fact.

Q. So there was something distinguishing these two bags from every other item on the conveyor belt; is that right?

A. Yes. As I said this morning, those dogs are trained to smell, attracted by the smell and not sight or appearance. Because all the parcels are wrapped differently, some in paper and some in burlap, and they all appeared differently to the dogs, so they only rely on the sense of smell.

Q. You know that to be a fact?

[131] A. That's what the dog handler informed me.

Q. Did you smell anything on these two bags?

A. Did I smell anything? I didn't attempt to and they didn't smell to me, no, sir.

Q. As I recall, these bags were sniffed one at a time; is that correct?

A. Yes, sir.

Q. And isn't it a fact that after the first bag was sniffed, it was removed and the second bag was placed in the same place that it was located?

A. I don't know if it was the same place, but placed in a place with the parcels.

Q. Wouldn't you agree with me that when you go on a trip you expect your suitcase to continue with you until the—from the time you leave your port of origin until the time you return to your port of origin?

A. Yes, sir.

Q. Would you agree with me that when traveling the items contained in your suitcases are very personal items?

A. They are my personal property.

Q. That's correct.

And isn't it also correct where this particular sniff was conducted, the area was not open to the public?

[132] A. That's correct.

Q. Now, after receiving the reactions from the dog Honey, the next step then seeking to look into these bags was to apply for a search warrant; is that not correct?

A. That's right.

Q. Did you participate in drafting the documents necessary to apply for a search warrant?

A. No, sir. Agent Iglesias was the one who appeared here on the following Monday morning, I believe it was the 20th of August, and made that application.

Q. Have you, since that time, had an opportunity to review the affidavit for a search warrant prepared by and signed by Agent Iglesias?

A. No, sir, I did not.

Q. But you were aware in the affidavit for a search warrant there was an attempt made to have a search warrant issued that went to both of the suitcases; is that not correct?

A. Yes, sir.

Q. And up until the point that the dog Honey came into the picture, everything that you could say as a

Government agent concerning these two bags identically were suited to each bag? In other words, there [133] was no difference factually or whatever in any way to distinguish the facts you were equipped with with respect to these two bags?

Do you understand the question?

A. I understand the question.

Q. In other words, if Mr. Place was nervous as to this bag, he was also nervous as to this bag; is that correct?

A. Yes.

Q. There was nothing that could distinguish these two bags up until the time that the dog Honey got a positive reaction on the small bag and a probable reaction on the large bag; is that not correct?

A. I would have to say it's incorrect.

Q. All right. Correct me.

A. In my original notes from Detective Robertson McGavock, it indicates that there was a different address on each of those bags. It also indicated to me that there was a difference of spelling on these two bags. One was "Place," and the other was "Palce," if I recall. One said 1865 South Ocean Drive, and the other said 1885 South Ocean Drive. And that Detective McGavock ran a telephone check with a place—with a phone left with National Airlines, and it came back at [134] one of the addresses and not the other address, and that there was no listing of Mr. Place at that address.

Q. Based on all of that information, did you have in your own mind any suspicion that one of these bags had narcotics and the other one did not?

A. When I asked a question—do you want me to answer it?

Q. You couldn't tell which, if any, had narcotic substance in them, could you?

A. No.

Q. So up until the time that Honey made the sniff of the two bags, you, based on the information that you had, could not make a determination as to which, if either of these two bags, had narcotic contraband contained in them; is that correct?

A. Yes, sir.

Q. So drawing back again to the application for the search warrant, but for the different reaction of the dog Honey, these bags were considered as one, one group of two bags; is that correct?

A. Yes, sir.

Q. Wouldn't you agree with me that the fact that the U.S. Magistrate who authorized the issuance of this search warrant based his determination of the [134] existence of the right to make that search on the sniff and the sniff alone, as taking you above the line for probable cause?

MR. WALLANCE: Objection, your Honor.

THE COURT: I will allow that.

A. I would say that's a question that was in the mind of Magistrate John Caden, and you may properly direct it to him, that question.

Q. I will direct it to you, though.

A. I don't know what was in his mind when he signed it.

Q. We know based on the entire case that there was nothing different between these bags, from the time you first observed it and based upon all the information related to you by Detective McGavock, there was absolutely nothing to distinguish the two, insofar as telling which one, if either, had contraband in it except that the dog had a possible reaction as to one and a probable reaction on the

other, and as to the probable reaction, the Magistrate denied the warrant; isn't that true?

MR. WALLANCE: I object, your Honor.

THE COURT: That's a fact, isn't it?

THE WITNESS: Yes, sir, it is a fact.

SUPREME COURT OF THE UNITED STATES

No. 81-1617

UNITED STATES,

PETITIONER

v.

RAYMOND J. PLACE

ORDER ALLOWING CERTIORARI. Filed June 7, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

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# In the Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
*Petitioner,*

*vs.*

RAYMOND J. PLACE

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

## BRIEF FOR RAYMOND J. PLACE IN OPPOSITION

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## QUESTION PRESENTED

**Whether the Fourth Amendment prohibits the seizure of personal luggage by law enforcement authorities when such seizure is warrantless and without probable cause.**

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## BRIEF FOR RAYMOND J. PLACE IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A, 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (Pet.App. D, 34a-57a) is reported at 498 F.Supp. 1217.

## JURISDICTION

The judgment of the court of appeals (Pet.App. B, 30a-31a), was entered on September 16, 1981. A petition for rehearing was denied on November 30, 1981 (Pet.App. C, 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (Pet.App. E, 58a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On August 17, 1979, Robertson McGavock, an officer of the Dade County Public Safety Department in Miami, Florida, was on assignment at Miami International Airport. (Tr. 8)[1] Officer McGavock was regularly assigned to Miami International Airport as a narcotics investigator. In an attempt to detect narcotics movement, Officer McGavock's duties included observing passenger movement on inbound and outbound airline flights. The National Airlines ticket counter was the site Officer McGavock selected to observe departing passengers on this date and it was at this site where he first observed the Defendant, Raymond Place. (Tr. 8-9)

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[1] "Tr." refers to the transcript of the suppression hearing

Officer McGavock was positioned in the line formed by unticketed passengers when Raymond Place took up a position immediately behind him in the queue. (Tr. 8-12) Although Officer McGavock had never seen or heard of Mr. Place and even though he had no information "as to anything regarding any subject" relating to Raymond Place, he directed his attention to Mr. Place when it appeared to him that Mr. Place was "scanning" the lobby area. (Tr. 10 & 64) After standing in line in front of Mr. Place for approximately five minutes, Officer McGavock left the ticket line and joined John Facchiano, one of the three other law enforcement officers comprising the team of which Robertson McGavock was a member this day. (Tr. 11) Once Officer McGavock left the ticket line he continued to observe Mr. Place from several locations until Mr. Place completed the purchase of his ticket. While Raymond Place was actually transacting his business with the airline ticket agent, Officer McGavock saw Mr. Place check two suitcases with name tags, purchase a ticket, and accept a ticket folder from the ticket agent with luggage claim stubs attached. Officer McGavock also watched the ticket agent indicate to Mr. Place the direction of concourse "F", the concourse utilized by National Airlines for its flights. (Tr. 11-14)

Once Raymond Place moved from the ticket counter area toward concourse "F", Officer McGavock moved to a position paralleling the baggage conveyor belt transporting Mr. Place's two checked suitcases. From this vantage point, Officer McGavock observed the suitcases and noted the baggage claim stubs indicated a destination of La Guardia International Airport. (Tr. 14-15) Once the two suitcases moved out of sight, Officer McGavock directed his team member, Officer Facchiano, to go to the baggage loading area to look at the name

tags on the two suitcases and determine what information they provided. Meanwhile, Officer McGavock continued to observe Mr. Place and watched him perform what the trial court identified as a "curious ballet." When Officer Facchiano returned from the baggage area he told McGavock the name on the suitcases was "Place . . . P-L-A-C-E." (Tr. 16-18) At this juncture, personal contact was made with Mr. Place as he waited his turn to pass through the departing passengers security gate for concourse "F". Officer McGavock admitted that at this point he had no knowledge of the Defendant being "involved in anything" and that contact was initiated because he *just had a feeling.* (Tr. 35) This feeling was based upon his observance of two "unusual" activities — "scanning the lobby and looking over his shoulder for an unusual length of time while walking through the lobby for a great distance." (Tr. 32)

Officer Facchiano made the first contact with Mr. Place while Robertson McGavock stationed himself approximately 20 feet away. Prior to joining Officer Facchiano, McGavock watched Facchiano produce and show his credentials to Mr. Place. (Tr. 19) Officer McGavock then joined them as they moved to a position out of the line for departing passengers. (Tr. 19) The personal contact with Mr. Place was for the purpose of conducting a "brief interview . . . to alleviate any of that suspicion we might have had." (Tr. 35) For the next several minutes, the officers asked Mr. Place his name and had him produce and hand over his airline ticket and his drivers license. (Tr. 36) The name given by Mr. Place, the name on the two suitcase name tags, and the name of the passenger indicated on the airline ticket corresponded without exception. (Tr. 37-38) The contents of Mr. Place's hand purse were also viewed by Officer McGavock as

Raymond Place looked inside it for identification. (Tr. 64) Additionally, Mr. Place gave the two officers permission to examine his checked suitcases, but the officers noted that there was less than five minutes until departure of Mr. Place's flight and therefore allowed Mr. Place to depart. (Tr. 22) Then, based upon Mr. Place's departing comment that he suspected the officers of being police officers when he saw them back in the lobby area, Officer McGavock rushed to the baggage loading area to get all the information he could from the two name tags on Mr. Place's suitcases. (Tr. 22-23)

When Officer McGavock arrived in the baggage area, he located the two suitcases and had 15-30 seconds to write down the identity information on the suitcase name tags. (Tr. 55) The information was identical in all respects except Officer McGavock testified one name tag had the street number 1865 while the other had the street number 1885. (Tr. 56) After taking steps to attach some significance to the address information, Officer McGavock communicated his suspicions about Mr. Place to Agent Gerard Whitmore of the Drug Enforcement Administration in New York. (Tr. 27)

Officer McGavock asked Agent Whitmore to meet National Airlines Flight No. 136 at La Guardia International Airport and to monitor Mr. Place's activities there and take "whatever action they might deem appropriate based on what I had told him." (Tr. 68) Officer McGavock told Agent Whitmore that he was basing his suspicions mainly on Mr. Place's actions in the lobby—staring and looking around closely at the people in the lobby and relating he had picked out 4 or 5 individuals as police officers. (Tr. 67)

2. At approximately 3:30 p.m. on August 17, 1979, Gerard Whitmore, an agent with the Drug Enforcement Administration, watched passengers deplane from National Airlines Flight No. 136 arriving at La Guardia International Airport from Miami. Agent Whitmore was accompanied by another agent, Alfredo Iglesias, who also surveilled passengers exiting this particular flight. (Tr. 75) Both Agent Whitmore and Agent Iglesias were specifically looking for a person previously described to them and identified for them as Raymond Place. (Tr. 76) The surveilling of this particular flight and the individual monitoring of Raymond Place's activities were the direct result of a telephone conversation between Agent Whitmore and Officer Robertson McGavock. (Tr. 104) In the telephone conversation between McGavock and Whitmore, Officer McGavock informed Agent Whitmore that a passenger identifying himself as Raymond Place was aboard National Flight No. 136. Agent Whitmore was also given a description of Raymond Place and was asked to meet Flight No. 136 when it arrived at La Guardia and to monitor Raymond Place when he deplaned. (Tr. 104-105) The basis for the request by Officer McGavock that Agent Whitmore meet Flight No. 136 and monitor Mr. Place's activities was Officer McGavock's suspicions aroused by Mr. Place's activities while at Miami International Airport prior to boarding Flight No. 136. Agent Whitmore had no previous knowledge of Raymond Place other than that he received from Officer McGavock. (Tr. 106) Agent Whitmore planned to observe Raymond Place and determine in his mind if Mr. Place was, indeed, acting suspicious. (Tr. 106)

Raymond Place was among the first 25 or 30 passengers deplaning Flight No. 136. (Tr. 106) Agent Whitmore observed Mr. Place "looking around, and

thought such activity was extremely unusual." (Tr. 108) However, Agent Whitmore admitted that had he not been specifically observing Mr. Place, his attention may not have been drawn to this particular passenger. (Tr. 109)

According to Agent Whitmore, surveillance of Mr. Place was not continuous, but was voluntarily broken off between the deplaning area and the baggage claim area. During this interim period when Mr. Place was not being surveilled, Agent Whitmore positioned himself outside the railing surrounding National Airlines baggage claim area. (Tr. 77) Shortly after taking up this position, Agent Whitmore observed Mr. Place approach the baggage claim area from the direction of an adjoining baggage claim area. Once Mr. Place arrived at the designated baggage claim area, Agent Whitmore continued to be suspicious because of Mr. Place's scanning of the area. (Tr. 77-78)

When National Airlines Flight No. 136 baggage began arriving, Raymond Place proceeded to collect his two suitcases as they appeared on the carrousel. (Tr. 78-79) Mr. Place then presented the security person with his baggage claim stubs and began to walk away from the National Airlines baggage area toward the TWA baggage area. (Tr. 79-80) Agents Whitmore and Iglesias exchanged glances and head nods and then proceeded to follow Mr. Place to TWA's baggage claim area. When Mr. Place reached the TWA baggage area, he placed a call on a direct-line limousine service telephone. (Tr. 83) The decision to approach Mr. Place for purposes of interviewing him was made by Agent Whitmore when he observed Raymond Place complete this limousine telephone call. (Tr. 83) Agent Whitmore testified that

the purpose of the interview was to have Mr. Place explain his suspicious activity. (Tr. 127)

When the investigatory stop was initiated Agent Whitmore produced his own credentials and identified himself as a federal narcotics agent to Mr. Place. Agent Whitmore testified that Mr. Place asked him "why we [Whitmore and Iglesias] had stopped him." (Tr. 84) In response to Mr. Place's question, Agent Whitmore informed him that information had been received from the Dade County Public Safety Department, and that "based on observations that Agent Iglesias and [Whitmore] had made at the airport, that [Whitmore] was under the belief that there was a possibility that he was carrying narcotics." (Tr. 84) Mr. Place was next asked whether the luggage he had with him belonged to him, and then he was asked to produce identification and his airline ticket. (Tr. 85) Mr. Place was never asked to explain why he was scanning the area or why he appeared to be nervous, even though the purpose of the interview was to allow him an opportunity to offer such an explanation. (Tr. 126-127) The airline ticket and the drivers license produced by Mr. Place confirmed the information already communicated to the agents by Officer McGavock. Indeed, Agent Iglesias ran a NCIC computer check utilizing the information provided by Mr. Place's drivers license and determined there was no basis for holding Mr. Place for further questioning. (Tr. 92)

The agents seized the two suitcases possessed by Mr. Place and acknowledged by Mr. Place to belong to him. This seizure was without the consent of Mr. Place. (Tr. 128) Agent Whitmore also admitted his intentions

to take custody of the two suitcases regardless of whether or not Mr. Place consented to the seizure. (Tr. 129)

3. The court of appeals was particularly disturbed by the "high-handed" procedure which Agents Whitmore and Iglesias utilized when seizing Mr. Place's luggage. (Pet.App. A, 18a-19a) The agents lied to Mr. Place by informing him that they were taking his luggage to a federal judge when, in fact, the agents were taking Mr. Place's personal effects to J.F.K. Airport, where they intended to subject the luggage to a so-called "sniff search" by a dog trained to detect controlled substances.

Also, the court of appeals was certainly aware in reaching its decision that other circuits, which had been called upon to determine the same legal issue, had relied upon this Court's decision in *United States v. Van Leeuwen*, 397 U.S. 249 (1970). However, the court of appeals likewise was aware that not only were the facts supporting this Court's decision in *Van Leeuwen* clearly distinguishable from the facts present in the case at hand, but also, was aware, and took effort to point out, that the cases emanating from the other circuits were factually distinguishable in several critical ways from Mr. Place's situation. (See Pet.App. A, 20a-21a)

In reversing the judgment of conviction, the court of appeals succinctly summarized its position by stating:

> It is simply not a 'temporary detention for investivative purposes' when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never

> disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment Right (*id.* at 21a).

## ARGUMENT

1. The petitioner frames the holding of the court of appeals as follows:

> The court of appeals has held that the police may not detain . . . luggage temporarily for the purpose of pursuing a specific course of investigation calculated to confirm or dispell . . . suspicion; rather, the police must allow the individual to leave with his baggage, with the almost certain result that any contraband contained in the baggage will be distributed or destroyed. (Pet. 10-11).

The holding of the court of appeals is more accurately stated by quoting directly from the opinion:

> The pivotal question raised by this appeal is whether a warrantless government seizure of a person's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment Rights. We hold that it does. (Pet.App. A at 1a-2a).

The petitioner further compounds its inaccurate assessment of the decision and opinion rendered by the

court of appeals by asserting that a direct conflict exists between the decision of the court of appeals in this case and the decisions of three other courts of appeals. The petitioner cites as authority for its position the decisions of *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981), *United States v. Viegas*, 639 F.2d 42, cert. denied, No. 80-1344 (May 4, 1981), and *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980). Any support for its position which the petitioner seeks to invoke by asserting the existence of a conflict between the decision of the court of appeals in this case and the decisions of three other courts of appeals, does not withstand thoughtful examination. Indeed, the court of appeals below carefully examines the decisions rendered in *United States v. Viegas, supra*, and *United States v. Klein, supra*, and determines that the intrusions into constitutionally protected areas which were presented for determination in those cases did not approximate the seriousness of the intrusion presented by the facts of this case. (See Pet.App. A, 20a-21a) The court of appeals below specifically distinguishes the facts in the case at hand by pointing out that in none of the other cases emanating from other circuits does it appear:

> (1) That the detention of the baggage for investigation lasted for as long a period of time as in the present case,
>
> (2) That the baggage was removed from the airport to another location without the passenger's consent,
>
> (3) That the agents concealed their plans for investigation of the baggage, or,

(4) That they indicated that the baggage detention would be of indefinite duration. (Pet.App. at 21a)

Not unexpectedly, the petitioner now seeks to create conflict between the circuits on the issue at hand where no such conflict exists. The courts of appeal are themselves aware that decisions reaching the question presented by this case may well be decided through the application of Fourth Amendment principles on a case-by-case basis. Compare *United States v. O'Connor*, 658 F.2d 688 (9th Cir. 1981) and *United States v. Martell*, *supra*.

2. The petitioner also argues that the decision of the court of appeals below ". . . incorrectly analyzes certain broad principles of the Fourth Amendment law". The petitioner takes issue with the suggestion, that in the absence of exceptional circumstances, the same Fourth Amendment standards apply to both seizures and to searches. In support of its attack on the court of appeals below, the petitioner relies heavily on this Court's decision in *United States v. Van Leeuwen*, *supra*, a decision in which this Court specifically limited its decision to the facts presented by that case. Indeed, since the rendering of this Court's decision in *Van Leeuwen* more than a decade ago, this Court has not cited *Van Leeuwen* as authority for the position which the petitioner now urges this Court to adopt.

Next, the petitioner further attempts to obscure the subtle distinctions that exist between searches and seizures because of certain well-defined, and jealously-guarded, exceptions to the Fourth Amendment's requirements. The petitioner's unilateral attempt to expand such "exceptions" to the general principles of

the Fourth Amendment and thereby impute error to the court of appeals' decision must fail, since even in the decisions of *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977), which petitioner cites as support for its position, the seizures of the items of personalty were based upon the existence of probable cause.

The decision of the court of appeals in the case at hand is well-reasoned, compatible with the decisions of other courts of appeals, and is constitutionally sound.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 81-1617

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RAYMOND J. PLACE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

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## QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from temporarily detaining personal luggage reasonably suspected of containing narcotics for the purpose of arranging its exposure to a trained narcotics detection dog.

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (Pet. App. 34a-57a) is reported at 498 F. Supp. 1217.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on September 16, 1981. A petition for rehearing was denied on November 30, 1981 (Pet. App. 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (Pet. App. 58a). The petition

was filed on (Monday) March 1, 1982, and was granted on June 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

## STATEMENT

Following the denial of his suppression motion, respondent pled guilty in the United States District Court for the Eastern District of New York to possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to three years' imprisonment. Finding that the temporary detention of respondent's suitcase in order to permit its exposure to a narcotics detection dog violated the Fourth Amendment, the court of appeals reversed.

1. a. The evidence adduced at the suppression hearing is set forth in the opinions of the courts below (Pet. App. 2a-6a, 34a-41a). It showed that on Friday morning, August 17, 1979, two Dade County, Florida, narcotics investigators, Detectives McGavock and Facchiano, on duty at the Miami International Airport, were observing passengers standing in line at the National Airlines ticket counter (*id.* at 34a). Their attention was attracted to respondent, who,

[1] Respondent entered the plea of guilty reserving the right to appeal the denial of the motion to suppress (Pet. App. 2a).

while standing in the ticket line, appeared to be nervously scanning the area and closely scrutinizing everyone entering or seated in the lobby (*id.* at 35a). In particular, respondent was observed staring at Detective McGavock as the officer conferred with Detective Facchiano and moved around the lobby area, although respondent would look away when Detective McGavock looked at him (*ibid.*).

After respondent purchased his ticket with cash and checked two suitcases, Detective Facchiano went to the baggage loading area to examine the identification on the luggage, while Detective McGavock followed respondent. He observed respondent walk toward the concourse gate for his flight and then suddenly return toward the ticket counter and walk a complete circle around the lobby area while continuously looking back over his shoulder (Pet. App. 35a-36a). Respondent then walked toward the concourse gate again, stopping for less than a minute in a restroom. In the meanwhile, Detective Facchiano rejoined Detective McGavock after ascertaining that the name on respondent's bags appeared to be "Place" (*id.* at 36a).

When respondent reached the security gate in the boarding area, Detective Facchiano approached him, displayed his credentials, and, after explaining that there was a serious contraband problem at the airport, asked respondent if he would show the officers some identification and his airline ticket. Respondent began to perspire heavily and handed the detective his ticket and driver's license, which identified him as Raymond Place. Detective Facchiano then asked respondent for consent to examine the contents of the suitcases respondent had checked. Respondent replied that he had no objection. Nevertheless, because re-

spondent's flight, bound for New York's LaGuardia Airport, was due to depart shortly, the officers decided not to search the luggage and terminated the discussion (see Tr. 28, 74).[2] As respondent proceeded to the security gate, he turned and remarked that he had recognized the detectives as police officers when he first saw them in the lobby (Pet. App. 36a-37a).

Detective McGavock then decided to go to the baggage loading area to examine respondent's luggage himself. He noticed that the identification labels on the two suitcases bore different street addresses in Hallandale, Florida. After copying down the addresses and obtaining from the airline the call-back telephone number that respondent had given with his reservation, Detective McGavock telephoned the Hallandale police department. They informed him that neither of the street numbers on respondent's suitcases existed and that the telephone number was for a residence at a different address on the same street as the addresses on the baggage tags. Detective McGavock then telephoned DEA Special Agent Gerard Whitmore in New York and informed him of what had transpired, giving him a description of respondent and his luggage (Pet. App. 37a-38a).

b. Agent Whitmore and his partner, Agent Iglesias, recognized respondent as he deplaned upon arrival at LaGuardia Airport. While walking to the baggage area, respondent repeatedly looked behind him, stopping once to look at the persons around him. At the baggage claim area, the agents observed respondent standing just outside the entrance looking at every person in the area. When the luggage arrived, respondent entered and picked up his bags. When Agent Whitmore began to follow respondent

[2] "Tr." refers to the transcript of the suppression hearing.

down a corridor, respondent abruptly stopped, turned, and stared at the agent (Pet. App. 38a-39a).

After respondent made a telephone call, apparently to a limousine service, the agents approached him, and Agent Whitmore identified himself to respondent as a federal narcotics agent. Respondent immediately remarked (Tr. 83): "I knew you guys were cops. I spotted [Agent Iglesias] as soon as I got out of the plane." The agent explained that, based partly on information relayed by the Dade County police, he suspected respondent of carrying narcotics. Respondent was asked whether the suitcases he was carrying were his. He replied that they were and added that a gang of police had surrounded him in the Miami Airport, humiliated him, and searched both his person and his luggage. Agent Whitmore then responded that he had been informed that respondent had not been searched at the Miami Airport, but respondent repeated his assertion that he had been searched. The agent then asked to see respondent's identification and requested permission to examine the contents of the suitcases, explaining that, in the absence of consent, the luggage could not be searched without a warrant (J.A. 5; Pet. App. 39a-40a).

Respondent declined to consent to a search and inquired whether he was under arrest or was free to leave the airport with his luggage. Agent Whitmore told respondent that he was not under arrest and was free to leave, but his luggage would be taken to a federal judge to make a determination as to whether a search warrant should issue. He also informed respondent that he could accompany the agents on the trip to the magistrate (J.A. 5-6). Respondent declined, however, explaining that he would be unable to do so because of "pressing en-

gagements" (J.A. 6). Agent Whitmore gave respondent a phone number where the agent could be reached at any time so that respondent could arrange for the return of his luggage (J.A. 9), and the agents loaded the luggage into a car and left the airport (Pet. App. 40a-41a).[3]

The agents then drove with the bags to a Customs Bureau dog handler facility at Kennedy Airport, leaving LaGuardia at about 4:10 p.m. and arriving at Kennedy approximately 35 minutes later (J.A. 11). Respondent's bags were placed among other parcels for exposure to a trained narcotics detecting dog and, at approximately 5:30 or 5:40 p.m., the dog signaled the presence of drugs in the smaller bag and reacted ambiguously toward the larger bag. Thereafter, a United States magistrate issued a search warrant for the smaller bag. Agent Whitmore then opened the bag and found 1,125 grams of cocaine, 25 LSD tablets, and a quantity of marijuana (Pet. App. 41a; J.A. 11-14).

2. Prior to trial respondent moved to suppress the evidence found in the smaller suitcase. The district court denied the motion, rejecting the claim that the temporary detention of the suitcase violated the Fourth Amendment. Relying heavily on *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the court held that reasonable suspicion that luggage contains contraband justifies a limited detention to obtain a dog sniff of the sort involved here (Pet. App. 52a-57a). Finding that the agents' observations of respondent's behavior during questioning "were suffi-

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[3] Before the agents left, respondent twice approached Agent Whitmore and inquired whether something could be "arrange[d]" or "fix[ed] up" so that he could leave the airport with his luggage (Pet. App. 40a; J.A. 7-8, 9).

cient to raise in the agents' mind a reasonable suspicion to believe that the bags contained narcotics,"[4] the court concluded that respondent's "Fourth Amendment rights were not violated by the detention of the bags by the DEA agents" (*id.* at 57a).[5]

3. A divided court of appeals reversed (Pet. App. 1a-29a). The majority assumed that the DEA agents' observations of respondent's behavior and the information they obtained from the Dade County detectives justified a reasonable suspicion that he was a drug courier,[6] but it concluded that "the prolonged seizure of [respondent's] baggage went far beyond

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[4] The district court noted that, in its view, the facts known to or observed by the agents were sufficient to constitute probable cause (Pet. App. 57a n.7).

[5] The court also rejected respondent's arguments that his Fourth Amendment rights were violated by the approaches made to him by the police in both Miami and New York. It held that both encounters were supported by reasonable suspicion that respondent was engaged in unlawful activity and gave a detailed enumeration of the factors that warranted the suspicion in each instance (Pet. App. 47a-52a). The court also rejected respondent's claim that the dog sniff was arranged so as to draw attention to his suitcases and hence was unreliable (*id.* at 57a).

[6] The court of appeals rejected the district court's view that the detention of respondent's luggage was supported by probable cause (Pet. App. 11a-12a). While we do not acquiesce in the correctness of that conclusion, especially in light of respondent's apparent bribe attempt (see note 3, *supra*) and his retreat from his earlier assertion of ownership of the smaller bag (see J.A. 8), we assume for purposes of this brief that the bags were detained on the basis of reasonable suspicion falling short of probable cause. Respondent challenged in a cross-petition the court of appeals' assumption that there was reasonable suspicion here, but that cross-petition was denied. No. 81-1835 (June 7, 1982).

a mere investigative stop and amounted to a violation of his Fourth Amendment rights" (*id.* at 14a).

The court of appeals first examined decisions of this Court concerning investigatory detentions of persons based on *Terry* v. *Ohio*, 392 U.S. 1 (1968). Relying on *Dunaway* v. *New York*, 442 U.S. 200, 212-213 (1979), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975), the court observed that an investigative stop of a suspect "has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found" (Pet. App. 14a). The court then rejected the notion that the standard of reasonableness applicable to the detention of baggage could differ from that applicable to the detention of a person, stating (*id.* at 16a):

> [T]he Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

Proceeding from this premise, the court concluded that, because a detention of respondent's person for the length of time involved here and his removal to a different location for the purpose of determining whether he was carrying narcotics would have violated the Fourth Amendment in the absence of probable cause (*ibid.*), the detention of his luggage in order to bring it to a drug detection dog "cannot reasonably be characterized as a *Terry*-type 'investigative stop'" (*id.* at 18a). Rather, the action "amounted to a seizure without probable cause of

[respondent's] effects in violation of his Fourth Amendment rights" (*ibid.*).[7]

The court further stated that *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), which involved the detention by postal officials for further investigation of mail packages suspected of containing contraband, was of no relevance to this case because the detention in *Van Leeuwen* occurred only after the owner of the parcels had voluntarily deposited them with the Postal Service. The court of appeals concluded that *Van Leeuwen* involved "at most a minimal or technical interference" with an individual's rights as opposed to the "substantial intrusion" involved here (Pet. App. 20a). Accordingly, the court found "unpersuasive" three decisions in other circuits upholding the constitutionality of similar temporary baggage detentions for the purpose of performing a dog sniff test (*id.* at 20a-21a).[8]

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[7] The court also opined that the Fourth Amendment violation was exacerbated by the agents' statement that they were taking the bags to a federal judge to get a search warrant, when they in fact first took them to another airport for exposure to a drug detection dog. Moreover, because the agents did not specify when the luggage would be returned, the court suggested that respondent could have understood that it would not be returned to him for "weeks." The court characterized this lack of disclosure as "not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment" (Pet. App. 18a-19a).

[8] The court also asserted that those cases were factually distinguishable because it did not appear in them (1) that the duration of the detention was as long as it was here; (2) that the baggage was removed from the airport to another location; (3) that the agents concealed their plans for investigation of the baggage; and (4) that the agents indicated that the baggage detention would be of indefinite duration (Pet. App. 21a).

Judge Oakes filed a concurring opinion (Pet. App. 22a-23a) in which he asserted his view that seizures based on less than probable cause should be permissible only when made pursuant to "reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review" (*id.* at 22a).

Judge Kaufman dissented (Pet. App. 23a-29a), concluding that "the temporary detention of [respondent's] luggage was a reasonable 'stop' within the meaning of *Terry*" (*id.* at 28a). He explained that the Fourth Amendment's prohibition against "unreasonable" searches and seizures requires that "the government interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy" (*id.* at 24a). Here, the "public interest in holding [respondent's] suitcase for a 'sniff test' was compelling—detection of an individual who trafficks in drugs" (*id.* at 24a-25a), and the agents' observations "reveal[ed] such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained [respondent's] bags" (*id.* at 24a-25a). Judge Kaufman emphasized the limited nature of the intrusion in that respondent himself was not detained, nor did the agents invade his privacy interest in the contents of his suitcases prior to securing a warrant (*id.* at 25a-27a). He also stated his view that the principles of *Van Leeuwen* were fully applicable here and that, contrary to the majority's assertion, the baggage detention cases in other circuits were not distinguishable (*id.* at 27a-28a & n.2).

## SUMMARY OF ARGUMENT

A. The "reasonableness" of a search or seizure for Fourth Amendment purposes is judged by balancing the magnitude of the intrusion on the individual's Fourth Amendment interest against the government interest served thereby. See, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). While probable cause has been adopted as the normal benchmark for evaluating the reasonableness of searches, there are circumstances involving a lesser privacy intrusion or a reduced privacy expectation in which a search may be conducted on less than probable cause. Similarly, the concept of a "seizure" encompasses a broad spectrum of police actions, some of which involve only a modest intrusion into an individual's liberty and hence may be effected on the basis of suspicion that does not amount to probable cause. In the case of seizures of the person, some seizures need be based only on a reasonable suspicion of criminal activity in order to be "reasonable." Other seizures, however—arrests and their functional equivalents—are of such duration and severity that they are unreasonable in the absence of probable cause. Thus, there is a large class of seizures or temporary detentions, including those of more than momentary duration but not tantamount to an arrest, that may be effected on the basis of reasonable suspicion if justified by a strong government interest in investigating criminal activity. See generally *Michigan* v. *Summers*, 452 U.S. 692 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

B. The concept of an investigative detention on the basis of reasonable suspicion also applies to detentions of personal effects. Moreover, such a detention may be of longer duration than a detention of the person because it entails a significantly lesser intrusion into personal liberty. For example, in

*United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the Court approved the detention on the basis of reasonable suspicion of two packages sent through the mail, because the detention was necessary for the pursuit of a specific line of inquiry. The Court explained that such a detention was reasonable because the significant Fourth Amendment interest involved—the privacy of the mail—was not disturbed.

The court of appeals' holding that the luggage detention here was unreasonable in the absence of probable cause rests on two faulty premises. First, the court asserted (Pet. App. 6a-7a) that "[w]ith rare exceptions" a seizure requires both probable cause and a warrant. This assertion is flatly wrong as to the warrant requirement. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587 (1980). And as to the suggestion that probable cause is a standard prerequisite to seizures generally, the court ignores the teaching of *Van Leeuwen*, *Terry*, and other cases that a seizure, particularly one limited to an individual's effects, is not an invasion of privacy like a search and hence does not interfere with an individual's Fourth Amendment interests to the same extent.

More important, the fundamental basis for the court's holding—that "the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property" (Pet. App. 16a)—is manifestly erroneous unless the reasonableness standard is to be read out of the Amendment. Plainly, the detention of baggage is significantly less intrusive than the detention of a person. A person who is detained is effectively prevented from going about his normal business. By contrast, a temporary detention of baggage or other property has no similar consequences; while it is theoretically some intrusion onto the individual's liberty that is

protected by the Fourth Amendment, the detention is, as a practical matter, no more than an inconvenience.

Because the Fourth Amendment determination of the "reasonableness" of a government action depends upon a balancing of the relative magnitudes of the intrusion and the government interest involved, the fact that a baggage detention is significantly less intrusive than a detention of a person must be a critical factor in the determination whether a particular baggage detention is reasonable when effected on the basis of a reasonable suspicion of criminal activity. There is of course a point at which further prolongation of any seizure will become unreasonable in the absence of probable cause. But, because of the relative modesty of the intrusion, reason dictates that a temporary detention of luggage may continue for a longer period on the basis of reasonable suspicion than could a detention of a person under similar circumstances.

C. In this case, a proper balancing of the strong government interest implicated when law enforcement officials reasonably suspect luggage to contain contraband and the interests of suspected drug couriers inconvenienced by a temporary detention of that luggage for a dog sniff test compels the conclusion that such a detention is reasonable. The government has a compelling interest in controlling the flow of narcotics. To further this goal, the government has established an airport surveillance program designed to detect domestic drug couriers, pursuant to which government agents observe selected flights and approach and question suspected drug couriers. In some cases, like respondent's, the brief questioning neither allays the agents' suspicions nor results in sufficient additional information to give rise to probable cause to arrest. In these circumstances, the

fact that it might be unreasonable to detain the individual himself any longer does not necessarily mean that investigating officers must allow him to place the narcotics he is reasonably suspected of transporting into the stream of distribution, when detention of the luggage for the purpose of arranging a dog sniff test will enable the officers to confirm or dispel their suspicions. This detention is of only the limited duration necessary to undertake a specific course of investigation, and the government has a strong interest in being able to maintain the status quo long enough to complete that inquiry because, given the extreme reliability of the sniff test, it is almost certain to confirm or dispel the agents' suspicions.

The countervailing intrusion here was modest. Respondent was allowed to leave, and his luggage was immediately taken to the dog handling facility for the test; the duration of the entire process until probable cause was established was no more than 90 minutes. No privacy interest of respondent's in the contents of the luggage was invaded at all, either by the detention or by the sniff test (which reveals no information other than the presence or absence of narcotics). Thus, the detention involved at most a slight inconvenience to the respondent—the minimum possible under the circumstances unless the agents had allowed him to proceed with his luggage, enabling him to dispose of any contraband it might contain. As five other courts of appeals have held in this context, it would be extremely imprudent for agents to ignore their reasonable suspicions and allow a suspected drug courier to continue on his way with his luggage. Rather, given the substantial law enforcement interest implicated by the agents' reasonable suspicion and the limited intrusion involved in arranging the dog sniff test, it was "reasonable" within the mean-

ing of the Fourth Amendment for the agents to detain respondent's luggage for the limited time necessary to complete their investigation.

## ARGUMENT

### THE TEMPORARY DETENTION OF RESPONDENT'S LUGGAGE FOR FURTHER INVESTIGATION BASED ON A REASONABLE SUSPICION THAT IT CONTAINED NARCOTICS DID NOT VIOLATE THE FOURTH AMENDMENT

#### A. Seizures Of Limited Duration May Be Effected On The Basis Of Reasonable Suspicion

The substantive command of the Fourth Amendment prohibits "unreasonable searches and seizures" but does not further define the term "unreasonable." By its terms, then, the Fourth Amendment does not require that searches or seizures be based on probable cause. Rather, the decision whether a given type of search or seizure requires probable cause depends on whether it would be reasonable to permit the action on the basis of a lesser justification. And in analyzing a particular search or seizure to determine whether this "key principle" of reasonableness has been satisfied, the courts must engage in a "balancing of competing interests." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981), quoting *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). Specifically, the reasonableness of an action is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S.

543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967). This balancing is not made entirely on an *ad hoc* basis; the Court has established certain basic principles that guide the reasonableness determination.

Some types of searches and seizures are *per se* unreasonable in the absence of probable cause. For example, the search of a person's home, which is a most substantial intrusion on his privacy, cannot be conducted except on the basis of probable cause. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 583-590 (1980). There are, however, other circumstances in which a search may be conducted in the absence of probable cause to believe that evidence of criminal activity will be found—either because the search intrudes into an area where there is a significantly reduced privacy expectation or because of the strong government interest that necessitates the search. See *New York* v. *Belton*, 453 U.S. 454 (1981) (search incident to arrest); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 320-321 (1978) (administrative search); *United States* v. *Ramsey*, 431 U.S. 606 (1977) (border search); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (inventory search of automobile); *Cady* v. *Dombrowski*, 413 U.S. 433, 448 (1973) (search to protect safety of public); *Terry* v. *Ohio*, 392 U.S. 1, 24-27 (1968) (limited weapons search); see also Brief for the United States as Amicus Curiae at 17-22 in *Florida* v. *Brady*, No. 81-1636, 1982 Term (search of an open field).[9]

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[9] There are also areas of reduced privacy expectation, such as automobiles, where searches normally must be based upon probable cause, but the prophylactic measure of a warrant is not required. See, *e.g.*, *United States* v. *Ross*, No. 80-2209 (June 1, 1982).

Similarly, it is well established that seizures, which do not involve the privacy intrusion that is occasioned by a search, may sometimes be effected on less than probable cause. In general, two different substantive standards of suspicion are relevant in determining the reasonableness of seizures. Some police actions, even though they do constitute a seizure of the person (*i.e.*, a forcible restraint of the individual's freedom of movement), are sufficiently modest intrusions that they are "reasonable" when supported simply by a reasonable suspicion of criminal activity. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, *supra*; cf. *United States* v. *Martinez-Fuerte*, *supra*. On the other hand, some seizures are of such duration and severity that they may be undertaken only if probable cause exists to believe that the individual seized has committed a crime. The classic example of this latter type of seizure is a formal arrest, but the label attached by the police is not the dispositive factor. See *Dunaway* v. *New York*, *supra*. Rather, "the general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, *supra*, 452 U.S. at 700.

Thus, there is a significant class of detentions that, while constituting a Fourth Amendment "seizure," do not have the essential attributes of a formal arrest and hence are not so intrusive as to require probable cause. This Court's decisions establish some guidelines to be used in assessing whether a particular detention falls within this category. One such detention is the "stop-and-frisk" recognized in *Terry* v. *Ohio*, *supra*, where the Court held that reasonable suspicion that criminal activity was afoot provided a basis for a police officer briefly to detain a suspect

and search him for weapons. As the Court later explained in approving a similar detention in *Adams* v. *Williams*, 407 U.S. 143, 145 (1972), "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Rather, "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146.

The authority to detain on reasonable suspicion is not limited to situations where the suspect is believed to be armed and dangerous. In *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 881-882, the Court recognized that law enforcement officers validly could stop a car reasonably suspected of containing illegal aliens and briefly question the occupants concerning their immigration status and the circumstances that aroused the officers' suspicion. See also *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 552 (opinion of Stewart, J.), 560-566 (opinion of Powell, J.).

Moreover, an investigative detention based on reasonable suspicion may satisfy the "reasonableness" standard of the Fourth Amendment even if it is of more than momentary duration. This Court has noted that its precedents demonstrate that the rule permitting "limited intrusions" on the basis of reasonable suspicion "is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*." *Michigan* v. *Summers*, *supra*, 452 U.S. at 700. On the contrary, "[i]f the purpose underlying a *Terry* stop—investi-

gating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*." *Id.* at 700 n.12. In this connection, the Court quoted approvingly Professor LaFave's recitation of investigative techniques that could properly be conducted by police on the basis of reasonable suspicion, including detaining the suspect "while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people." *Id.* at 700-701 n.12, quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978). This power to detain on reasonable suspicion is of course not limitless, and it is clear that an investigative detention may become unreasonable if it is unduly prolonged. *Ibid.*; see also *Dunaway* v. *New York*, *supra*.

In sum, the court of appeals was doubly mistaken in the opening premise of its analysis (Pet. App. 6a-7a), that "[w]ith rare exceptions the seizure of a person or his effects is deemed *per se* 'unreasonable' unless a warrant has first been obtained from a neutral magistrate upon a showing of probable cause. *Katz* v. *United States*, 389 U.S. 347, 357 (1967)." The court's miscitation of *Katz* is illuminating; while there may have been a technical sense in which the conversations in *Katz* could be said to have been "seized," it is perfectly plain that the Court's concern was with the search (*i.e.*, the invasion of privacy involved in the overhearing). Indeed, far from there being a general principle that a warrant is required for a seizure, the rule is precisely the opposite. No warrant is required either for the arrest of an individual (*United States* v. *Watson*, 423 U.S. 411

(1976)) or for the seizure of property (*Payton* v. *New York*, *supra*, 445 U.S. at 587; *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977)).[10]

If the court of appeals had been correct in the assertion that seizures generally require warrants, there might be more force to its conclusion that probable cause is also a prerequisite, since the Warrant Clause of the Fourth Amendment does specifically require probable cause as a precondition to a warrant. Its premise is not correct, however, and its conclusion regarding the general necessity for probable cause is thus analytically flawed, in addition to being contrary to the well-established line of decisions of this Court discussed above that hold that probable cause is not uniformly required for reasonable seizures.

**B. A Temporary Detention For Further Investigation Of Luggage Suspected Of Containing Contraband Is A Limited Intrusion That May Be Effected On the Basis Of Reasonable Suspicion Even Though A Similar Detention Of The Person Might Require Probable Cause**

The concept of an investigative detention is not limited to the seizure of persons—indeed, it would be utterly irrational so to limit it. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the Court recognized that the Fourth Amendment permits the temporary detention of effects for further investigation when police reasonably believe that those effects contain contraband. In *Van Leeuwen*, two packages sent through the United States mails aroused the sus-

[10] While both *Payton* and *Steagald* v. *United States*, 451 U.S. 204 (1981), require some kind of warrant as a precondition to an arrest entry into private premises, it is evident from the analysis in those decisions that it is not the arrest itself (the "seizure") but rather the search of the premises for the suspect that triggers the warrant requirement.

picion of postal officials. The postal officials detained the packages for about a day while certain lines of inquiry were pursued. The information obtained during this period was used to obtain a search warrant, and contraband was discovered in the packages.

A unanimous Court held that the detention did not violate the Fourth Amendment. The Court recognized that the case presented a *Terry*-type question and acknowledged that "detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment." 397 U.S. at 252. The Court found, however, that the particular intrusion involved in *Van Leeuwen* did not rise to that level. The Court emphasized that "[t]he significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained" (*id.* at 253). The Court concluded that "[d]etention for this limited time was, indeed, the prudent act" and not " 'unreasonable' within the meaning of the Fourth Amendment" (*ibid.*).[11]

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[11] It is possible to analyze the postal officials' actions in *Van Leeuwen* as not involving a Fourth Amendment "seizure" at all, on the ground that the packages had been voluntarily delivered into the hands of the Postal Service. On the other hand, the bailment of the packages was for the purpose of having them transported to the addressees, and it is equally possible to conclude that a seizure did occur as soon as they were diverted from the normal stream of mail transportation and retained for criminal investigative purposes. It is plain from the Court's opinion that it was of the view that the diversion of mail from normal handling would at some point become a seizure even though the initial governmental custody was with consent.

While the court of appeals correctly noted that *Van Leeuwen* is distinguishable on its facts from the instant case (Pet. App. 20a), the court's failure to give adequate consideration to the analysis in *Van Leeuwen* led it to conclude erroneously that a baggage detention of more than momentary duration necessarily is a substantial intrusion requiring probable cause. First, the court's premise that, with rare exceptions, a seizure of a person or his effects is per se unreasonable in the absence of probable cause (Pet. App. 7a) is clearly mistaken. As explained above (pages 17-19, *supra*), there is a large class of seizures of the person that are not as intrusive as an arrest and that are reasonable in the absence of probable cause. This is because seizures do not involve the exposure of an individual's private effects to the police, and thus a seizure of brief duration ordinarily is not as severe an intrusion into interests safeguarded by the Fourth Amendment as a search. See, *e.g.*, *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *United States* v. *Lisk*, 522 F.2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976) ("There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property"); cf. *United States* v. *Salvucci*, 448 U.S. 83, 91-92 (1980) (possessory interest not sufficient to confer legitimate expectation of privacy). Because the principal Fourth Amendment interest in a bag or package is in the privacy of its contents, this distinction between searches and seizures is particularly marked in the area of seizures of effects. See *Van Leeuwen*, 397 U.S. at 253.

More important, the fundamental basis for the court of appeals' holding—that "the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of

his property" (Pet. App. 16a)—is manifestly erroneous. One need only imagine oneself in the position of a suspect to recognize instantly that the detention of baggage is significantly less intrusive than the detention of a person. When a person is detained, his freedom of movement is restrained, and he is effectively prevented from going about his normal business for the period of the detention. By contrast, the temporary detention of an individual's luggage is not an " 'intrusion upon the sanctity of the person.' " *Dunaway* v. *New York*, *supra*, 442 U.S. at 209, quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 17. The detention does not significantly interfere with the individual's activities, for he is free to proceed wherever he chooses and do whatever he wants. To be sure, the fact that a person has been temporarily dispossessed of his luggage is some intrusion on his autonomy and may give rise to a concern over the safety of his belongings that would not exist if he could retain the luggage in his possession.[12] In some cases, there may be some practical inconvenience to the individual as well, if he wants access during the period of detention to some item con-

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[12] In the particular context involved here, where the respondent had just retrieved his luggage after checking it with the airline, it is apparent that this interest in not relinquishing custody of the luggage was somewhat diminished (except insofar as his commission of a crime gave him a special interest in avoiding police custody of his luggage, a consideration that deserves no weight in the Fourth Amendment calculus). If respondent was willing to entrust his effects to the custody of airline officials, he should not be any more concerned about their safety while in the custody of law enforcement officials. Of course, whether or not he has any legitimate concern over the security of his effects, it is still some intrusion on his individual liberty to detain his luggage without his consent.

tained in the luggage.[13] But it is clear that this limited intrusion involved a luggage detention, even if it is somewhat greater than the detention of the mail in *Van Leeuwen*, is significantly less of an interference with interests protected by the Fourth Amendment than a detention of the person would be.

Because the Fourth Amendment determination of reasonableness depends on a balancing of the extent of the intrusion occasioned by the police action against the magnitude of the government interest involved (see page 15, *supra*), it is clear that consideration of the degree of the intrusion is a critical element in determining whether a particular police action requires probable cause or, alternatively, is reasonable if effected on the basis of reasonable suspicion. Therefore, the court of appeals' holding that temporary detentions of luggage must be treated for Fourth Amendment purposes exactly the same as detentions of persons is completely unsupportable.[14] Rather, the

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[13] The court of appeals stated that a baggage detention will sometimes be "catastrophic" because the baggage may contain medicine essential for the treatment of a heart condition (Pet. App. 17a). Checked luggage seems a peculiar place to put essential medications. In any event, we agree that when an individual needs access to some contents of seized luggage, it would be an unreasonably severe intrusion, and therefore violative of the Fourth Amendment, for the police to refuse access to the luggage for the purpose of removing the necessary items. Cf. *United States* v. *Benjamin*, 637 F.2d 1297, 1299 (7th Cir. 1981) (suspect permitted to remove certain personal effects from detained briefcase). Given the fact that an individual will ordinarily be permitted to remove necessities from his luggage, a luggage detention almost invariably will involve only a minor inconvenience to the owner, contrary to the court of appeals' suggestion that anyone but a "healthy vagrant" would be seriously inconvenienced (see Pet. App. 17a).

[14] In his treatise, Professor LaFave notes that a luggage detention would be tantamount to a detention of the person,

Ninth Circuit's contrary conclusion is clearly correct:

> *Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a *substantially less serious intrusion upon rights of the individual.*
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> * * * * *
>
> We look then to the standard of reasonableness as required by the fourth amendment in the seizure and detention of inanimate objects.

*United States* v. *Martell*, 654 F.2d 1356, 1359 (9th Cir. 1981) (emphasis added), petition for cert. pending, No. 81-1772.

Under the reasonableness standard of the Fourth Amendment, it is recognized that even seizures of the person may be somewhat prolonged on the basis of reasonable suspicion. See *Michigan* v. *Summers*, *supra*, 452 U.S. at 700. At some point, however, further prolongation of the intrusion caused

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and hence be subject to the same Fourth Amendment constraints, *if* the police do not dispel the belief that the "person must either remain on the scene [with his luggage] or else seemingly surrender his effects permanently to the police." 3 W. LaFave, *supra*, § 9.6, at 61 (1982 pocket part). In the absence of this consideration, however, Professor LaFave recognizes that a person's possessory interest in a container may be interfered with for some period of time on the basis of reasonable suspicion. *Ibid.* The court of appeals attempts to characterize this case as one where respondent feared that his luggage would be taken away, if not permanently, at least for a period of indefinite duration that could have lasted for "weeks" (Pet. App. 19a). But this assertion is belied by the record. The agents clearly informed respondent that his luggage would be returned to him if a magistrate refused to issue a search warrant, and they gave him a 24-hour number that respondent could call to arrange for the return of his luggage. See J.A. 6, 8, 9.

by the seizure becomes unreasonable in the absence of probable cause. See, *e.g.*, *Dunaway* v. *New York*, *supra*. Because the temporary seizure of luggage is so much less intrusive than that of a person, the point at which prolongation of the seizure becomes unreasonable in the absence of probable cause is considerably more distant. This is not to deny that at some point a detention of luggage would become sufficiently intrusive to require probable cause (see *United States* v. *Van Leeuwen*, *supra*, 397 U.S. at 252; *United States* v. *Regan*, No. 81-1722 (1st Cir. Sept. 1, 1982) (22-hour luggage detention required probable cause)), but ordinarily luggage may be detained on the basis of reasonable suspicion for longer than a person could be detained under similar circumstances.

**C. The Government Interest In Temporarily Detaining Respondent's Luggage While Pursuing A Specific Course Of Investigation Warranted The Limited Intrusion Involved**

In our view, the court of appeals failed to strike a proper balance here between the interests of society implicated when law enforcement officials reasonably suspect luggage of containing contraband and the interests of suspected drug couriers who are temporarily inconvenienced by detention of their luggage to arrange exposure to a drug detecting dog. Certainly there can be little doubt that the government has a vital interest in alleviating the serious drug abuse problem in this country. As the Second Circuit has noted, the societal costs of the enormous narcotics trade, "in terms of ruined and wasted lives, are staggering." *United States* v. *Oates*, 560 F.2d 45, 59 (1977). See generally W. Seymour, *The Young Die Quietly: The Narcotics Problem in America* (1972). Thus, "[t]he public has a compelling inter-

est in detecting those who would traffic in deadly drugs for personal profit." *United States* v. *Mendenhall, supra*, 446 U.S. at 561 (opinion of Powell, J.).

As part of its effort to stem the distribution of narcotics throughout the United States, the Drug Enforcement Administration (DEA) operates an airport surveillance program designed to detect and intercept couriers transporting narcotics between major drug source and distribution centers. See *United States* v. *Mendenhall, supra*, 446 U.S. at 562 (opinion of Powell, J.). Under this program, trained agents observe arriving and departing passengers on certain flights, looking for characteristics and behavioral traits that tend to distinguish drug couriers from ordinary passengers. When these observations give rise to a suspicion that a particular passenger is transporting narcotics, the agents follow a fairly standard investigative procedure in approaching and briefly questioning the suspect, including asking to see his identification and, if developments appear to justify it, asking for consent to a search.[15]

In some instances, the suspect's responses to the agents' questions or a brief consented-to search will dispel these suspicions, and there will be no reason to detain the suspect or his luggage. In other in-

[15] If the agents have some suspicion, but less than "reasonable suspicion," that an individual is carrying narcotics, they may approach him and ask him some questions, but the suspect is free to refuse to answer the questions and to walk away. See generally *United States* v. *Mendenhall, supra*; Brief for the United States as Amicus Curiae at 20-25 & nn.21, 24 in *Florida* v. *Royer*, No. 80-2146, 1981 Term. In this case, the district court found (Pet. App. 47a-52a) and the court of appeals assumed (*id.* at 14a) that the agents had a reasonable suspicion that respondent was engaged in criminal activity when they approached him in LaGuardia Airport.

stances, this brief investigation may disclose facts that ripen the agents' reasonable suspicion into probable cause, in which case the agents are empowered to arrest the suspect and seize his luggage pending application for a search warrant. In a third category of cases, however, the brief questioning of the suspect will neither allay the suspicion nor give the agents probable cause, yet further prolongation of the personal detention would be unreasonable. See, *e.g.*, *Dunaway* v. *New York*, *supra*. But to allow the suspect to proceed on his way with luggage reasonably believed to contain contraband would be imprudent, because the narcotics would almost certainly disappear quickly into the stream of distribution.[16] Therefore, where feasible in such cases, the agents allow the suspect to leave but temporarily detain his luggage so that a drug detecting dog can resolve whether the luggage in fact contains drugs before it is released from the agents' custody.

The luggage detention involved in these situations is not open-ended; rather, it is an action taken to preserve the status quo while the officers pursue a specific course of investigation of limited duration that will confirm or dispel the agents' reasonable suspicion that criminal activity is afoot. It is precisely this kind of specific investigation that has been recognized by this Court as justifying a detention of some duration on the basis of reasonable suspicion. For example, in *Van Leeuwen*, the justification for

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[16] Once the drug courier has become aware that he is under suspicion, it is virtually certain that he would "take immediate steps to dispose of any contraband located in the suitcase." *United States* v. *West*, 651 F.2d 71, 74 (1st Cir. 1981), petition for cert. pending, No. 81-307. See also Pet. App. 25a (Kaufman, J., dissenting).

the detention was to contact postal officials in Nashville, Tennessee, to obtain information about the addressee of one of the suspicious packages. See 397 U.S. at 250. See also *Michigan* v. *Summers*, *supra*, 452 U.S. at 700-701 n.12.

The prolongation—to a lesser extent—of an investigative detention of a person may also be justified by the need to preserve the status quo while completing a specific line of investigation. The courts of appeals have recognized the propriety of extending a detention in order to obtain information from another law enforcement agency (*United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978); *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975)) or to permit an officer with special expertise to arrive at the scene (*United States* v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976)). And, analogous to the situation here, it is permissible for police to detain a suspect on the basis of reasonable suspicion for the purpose of transporting him back to the scene of the crime for possible identification by the victim. *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). See also *United States* v. *Mayes*, 524 F.2d 803, 805 (9th Cir. 1975) (suspect detained while officers backtracked in order to verify or disprove his exculpatory explanation of his activities).

In this case, the government interest in maintaining the status quo in order to complete the specific course of investigation was particularly strong be-

cause the investigation was almost certain to confirm or dispel the agents' suspicions. A sniff test by a properly trained dog is "extremely reliable" and hence, as soon as the agents could arrange for the test, they could expect to have, depending on the dog's reaction, either probable cause or no reason to detain the suitcase further. See, *e.g.*, *United States* v. *Waltzer*, No. 82-1015 (2d Cir. June 25, 1982), slip op. 3556-3557; *United States* v. *Beale*, 674 F.2d 1327, 1334 (9th Cir. 1982); *United States* v. *Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977); 1 W. LaFave, *Search and Seizure* § 2.2, at 288 (1978).

Weighed against this government interest, the intrusion involved in the detention here was small. Respondent was clearly informed that he was free to leave and that his luggage would be returned to him if a search warrant was not procured. After respondent left, the agents immediately took the luggage over to the nearest available dog, at the Customs Bureau facility at Kennedy Airport.[17] Even in rush-hour traffic, it was at most 90 minutes until the sniff test was performed and the agents thereby obtained probable cause to believe the luggage contained contraband (see J.A. 11-12). The disposses-

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[17] The court of appeals suggested (Pet. App. 21a) that the transportation of the luggage to Kennedy, rather than bringing the dog to the luggage, made the intrusion here greater than necessary. But as Judge Kaufman pointed out in dissent (Pet. App. 26a), this fact is completely irrelevant. The intrusion into respondent's Fourth Amendment rights was the dispossession of the luggage. It was of no consequence to him whether the luggage was situated at Kennedy or LaGuardia Airport while it was temporarily in police custody. In addition, it would have been unreasonable in the particular circumstances to bring the dog to LaGuardia. See pages 31-32, *infra*.

sion of his luggage for this length of time, during which no privacy interest was invaded,[18] was not a substantial intrusion into respondent's protected Fourth Amendment interests; indeed, the 90-minute detention is not significantly longer than some detentions of persons that have been recognized as reasonable. See *United States* v. *Richards*, *supra* (one hour); see also *United States* v. *Contreras-Diaz*, *supra* (90-minute detention not necessarily unreasonable).

Moreover, the detention here was not extended any longer than necessary. The court of appeals suggested that the detention was unreasonable because the agents should have had a trained dog available at LaGuardia Airport to sniff respondent's luggage immediately upon his arrival, thus eliminating the need for detaining it (see Pet. App. 19a-20a). But this observation is based on hindsight and totally ignores the practicalities of the situation. First, the LaGuardia agents did not know that they would need a dog to search respondent's luggage. They did not even approach him immediately after he deplaned,

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[18] The detention itself, of course, while affecting a property interest, invaded no privacy interest. And because a canine sniff test produces no information about the contents of luggage other than whether it contains narcotics, it similarly did not implicate respondent's privacy interest in the contents of his luggage. See, *e.g.*, *United States* v. *Waltzer*, *supra*, slip op. 3557-3558; *United States* v. *Goldstein*, 635 F.2d 356, 360-361 (5th Cir.), cert. denied, 452 U.S. 962 (1981); 1 W. LaFave, *supra*, § 2.2, at 287-288; Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 Fordham L. Rev. 973, 987 (1976); cf. *United States* v. *Beale*, *supra* (recognizing that dog sniff establishes only whether or not narcotics are present but holding that reasonable suspicion required).

but instead waited until they had observed him for some period (see Pet. App. 38a-39a). Even if the agents had definitely decided in advance, on the basis of the information supplied by the Florida officers, to stop respondent for questioning, the investigation of suspected drug couriers is often completed without the need to summon a drug detecting dog. See pages 27-28, *supra*.[19]

More important, the paucity of trained drug detecting dogs makes it impossible as a practical matter to have a dog waiting whenever a suspected drug courier is arriving at an airport. The DEA itself has no drug detecting dog program. When the need arises for such a dog, the DEA seeks to borrow one from another law enforcement agency, generally the Customs Bureau or a state or local police department. Customs Bureau teams, consisting of a trained dog and its handler, are located at 28 international ports-of-entry but not at domestic terminals; hence, there is no team stationed at LaGuardia Airport. Because these teams are needed to perform their primary duties at the ports-of-entry, they are not ordinarily dispatched from their stations in order to lend assistance to the DEA, and certainly it would not have been appropriate here to take the Kennedy Airport dog team away from its other duties and send it over to LaGuardia Airport simply to await the arrival of respondent's plane. Thus, in many cases, particularly where the suspect arrives at an airport that does

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[19] In this case, because respondent had already consented to a search of his luggage in Miami, which the officers there decided not to perform because respondent's plane was leaving shortly (see Pet. App. 3a, 37a; Tr. 21-22), the DEA agents in New York had no reason to believe that they would require the services of a drug detecting dog.

not handle international flights, some period of delay in arranging a dog sniff is inevitable.

Theoretically, of course, the DEA could train its own dogs and station a dog and a handler in every airport where an airport surveillance program to detect drug couriers is in effect. In light of the very small numbers of travelers who are stopped by DEA agents in the course of this surveillance program,[20] however, and the fact that a dog is often unnecessary in the investigations that are commenced, the cost of training a dog and stationing a dog and handler at each airport would be totally out of proportion to the amount of use they would receive. Cf. *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 447 (warrantless search reasonable although it would have been unnecessary if police guard posted); *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970) (warrantless automobile search reasonable although there is no exigency). Thus, as a practical matter, the limited intrusion of a 90-minute detention of respondent's luggage was unavoidable here if the government's strong interest in pursuing a more complete investigation was to be served.

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[20] While comprehensive statistics reflecting the percentage of travelers approached by DEA agents in the course of the airport surveillance program are unavailable at this time, evidence adduced in some reported cases suggests the infrequency of these approaches. In *United States* v. *Garcia*, 450 F. Supp. 1020, 1022 (E.D.N.Y. 1978), a case also arising out of LaGuardia Airport and involving Agent Whitmore, the defendant was the only individual approached in an entire day of surveillance. Statistics kept during the first 18 months of the program at Detroit Airport showed only 96 encounters that resulted in searches. See *United States* v. *Mendenhall*, *supra*, 446 U.S. at 562 (opinion of Powell, J.), citing *United States* v. *Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977).

Apart from the court below, the courts of appeals have uniformly concluded in the context of the DEA program that a temporary detention of luggage to arrange exposure to a drug detecting dog is "reasonable" under the Fourth Amendment because the strong government interest involved outweighs the limited interference with the individual's liberty. The seminal case is *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), where the court found the principles enunciated in *Van Leeuwen* applicable in this context. Given the agents' reasonable suspicion that the luggage contained contraband, the court concluded, the agents "would have been remiss in not detaining the bags for further investigation." 626 F.2d at 26. See also *United States* v. *Benjamin*, 637 F.2d 1297 (7th Cir. 1981).

Four other courts of appeals have followed *Klein*. The Ninth Circuit in *United States* v. *Martell*, *supra*, 654 F.2d at 1359, particularly emphasized the lesser intrusion involved in a detention of luggage as compared to detention of a person; the court specifically held that the duration of the detention involved there was unreasonable in the case of a person but upheld the luggage detention. See also *United States* v. *Anderson*, 663 F.2d 934, 938 n.2 (9th Cir. 1981). The First Circuit recognized that the luggage detention "inconvenienced" the defendant, but held that such a limited interference with his privacy interests was not sufficient to render the detention unreasonable. *United States* v. *Viegas*, 639 F.2d 42, 45 (1st Cir.), cert. denied, 451 U.S. 970 (1981). See also *United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); but see *United States* v. *Regan*, *supra* (22-hour detention excessive). Since the decision of the court below, the Fourth and Tenth Circuits have also noted their

approval of *Klein*. *United States* v. *Corbitt*, 675 F.2d 626, 629 (4th Cir. 1982); *United States* v. *MacDonald*, 670 F.2d 910, 914 (10th Cir. 1982).[21]

The court of appeals' contrary conclusion flies in the face of the Fourth Amendment's reasonableness standard. The agents here were faced with a situation in which they reasonably suspected that respondent's luggage contained narcotics and knew that they could determine the accuracy of their suspicions within a couple of hours by subjecting the luggage to a dog sniff test. They acted reasonably in allowing respondent to go on his way, but retaining the luggage long enough to have the test performed. Surely, the

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[21] The court below asserted (Pet. App. 21a) that the contrary court of appeals decisions extant at that time were distinguishable from the instant case. The court noted that the agents here did not fully disclose to respondent their intentions with respect to the luggage. This allegation, of course, is irrelevant to the issue presented here, since it is undisputed that the detention was against respondent's wishes. In any event, the statement made by the agents here that they were detaining the luggage pending application for a search warrant appears almost identical to the statement made by the agent in *Klein*. See 626 F.2d at 25.

The majority below also asserted that the detention involved here was longer than that involved in the other cases. In fact, the record in both *Klein* and *Viegas* indicates that the detentions in those cases were significantly longer. See Comment, *Seizing Luggage on Less than Probable Cause*, 18 Am. Crim. L. Rev. 637, 638 (1981), citing suppression hearing transcript in *Klein* (detention in *Klein* approximately 2½ hours); 80-1344 Br. in Opp. 3, citing suppression hearing transcript in *Viegas* (agents in *Viegas* informed that dog would not be available for four hours). The luggage was detained in *West* for about an hour before the dog arrived (see *United States* v. *West*, 495 F. Supp. 871, 873 (D. Mass. 1980)) and in *Martell* for about 20 minutes (654 F.2d at 1358 (dog had been summoned 30 minutes before luggage was detained)).

"substantial law enforcement interest[]" implicated in the attempt to intercept this shipment of illicit drugs justified the "limited intrusion[]" involved in dispossessing respondent of his luggage for this relatively brief time period. *Michigan* v. *Summers*, *supra*, 452 U.S. at 699. "Detention for this limited time was, indeed, the prudent act," rather than letting the suspected narcotics out of the agents' custody and into the stream of distribution, and it "cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment." *United States* v. *Van Leeuwen*, *supra*, 397 U.S. at 253.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 81-1617

# in the Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

*Petitioner*

*vs.*

RAYMOND J. PLACE,

*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR RAYMOND J. PLACE

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## QUESTION PRESENTED

**Whether the Fourth Amendment prohibits the seizure of personal luggage by law enforcement authorities when such seizure is warrantless and without probable cause.**

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NO. 81-1617

# in the Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

RAYMOND J. PLACE,

*Respondent.*

## BRIEF FOR RAYMOND J. PLACE

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

1. On August 17, 1979, Robertson McGavock, an officer of the Dade County Public Safety Department in Miami, Florida, was on assignment at Miami International Airport (Tr. 8).[1] Officer McGavock was regularly assigned to Miami International Airport as a narcotics investigator. In an attempt to detect narcotics movement, Officer McGavock's duties included observing passenger movement on inbound and outbound airline flights. The National Airlines ticket counter was the site Officer McGavock selected to observe departing passengers on this date and it was at this site where he first observed the Defendant, Raymond J. Place (Tr. 8-9).

Officer McGavock was positioned in the line formed by unticketed passengers when by chance Raymond J. Place took up a position immediately behind him in the queue (Tr. 8-12). Although Officer McGavock had never seen or heard of Mr. Place, and even though he had no information "as to anything regarding any subject" relating to Raymond J. Place, Mr. McGavock directed his attention to Mr. Place when it appeared to him that Mr. Place was "scanning" the lobby area (Tr. 10 & 64). After standing in line in front of Mr. Place for approximately five minutes, Officer McGavock left the ticket line and joined John Facchiano, one of the three other law enforcement officers comprising the team of which Robertson McGavock was a member this day (Tr. 11). Once Officer McGavock left the ticket line he continued to watch Mr. Place from several locations until Mr. Place completed the purchase of his ticket. While Raymond J. Place was actually transacting his

[1] "Tr." refers to the transcript of the suppression hearing.

business with the airline ticket agent, Officer McGavock saw Mr. Place check two suitcases with name tags, purchase a ticket, and accept a ticket folder from the ticket agent with luggage claim stubs attached. Officer McGavock also watched the ticket agent point out to Mr. Place the direction of Concourse "F", the Concourse utilized by National Airlines for its flights (Tr. 11-14).

Once Raymond Place moved from the ticket counter area toward Concourse "F", Officer McGavock proceeded to a position paralleling the baggage conveyor belt transporting Mr. Place's two checked suitcases. From this vantage point, Officer McGavock observed the suitcases and noted the baggage claim stubs indicated a destination of La Guardia International Airport (Tr. 14-15). Once the two suitcases turned and passed out of sight, Officer McGavock directed his team member, Officer Facchiano, to go to the baggage loading area to look at the name tags on the two suitcases and determine what information they provided. Meanwhile, Officer McGavock continued to surveil Mr. Place and watched him perform what the trial court identified as a "curious ballet." When Officer Facchiano returned from the baggage area he told McGavock the name on the suitcases was "Place . . . P-L-A-C-E" (Tr. 16-18). At this juncture, personal contact was made with Mr. Place as he waited his turn to pass through the departing passengers security gate for Concourse "F". Officer McGavock admitted that he had no knowledge of Mr. Place being "involved in anything" and that personal contact was initiated because he *just had a feeling* (Tr. 35). This feeling was based upon his observance of two "unusual" activities—"[1] scanning the lobby and [2] looking over his shoulder for an unusual length of time while walking through the lobby for a great distance" (Tr. 32).

Officer Facchiano confronted Mr. Place first while Robertson McGavock stationed himself approximately 20 feet away. Prior to joining Officer Facchiano, McGavock watched Facchiano produce and show his credentials to Mr. Place (Tr. 19). Officer McGavock then joined his partner and Mr. Place and they moved to a position out of the line for departing passengers (Tr. 19). The initial contact with Mr. Place was for the purpose of conducting a "brief interview . . . to alleviate any of that suspicion we might have had" (Tr. 35). For the next several minutes, the authorities asked Mr. Place his name and had him produce and hand over his airline ticket and his drivers license (Tr. 36). The name given by Mr. Place, the name on the two suitcase name tags, and the name of the passenger indicated on the airline ticket corresponded without exception (Tr. 37-38). The contents of Mr. Place's hand-held bag were also viewed by Officer McGavock as Raymond J. Place looked inside it for identification (Tr. 64). Additionally, Mr. Place gave the two officers permission to examine his checked suitcases, but the officers noted that there was less than five minutes until departure of Mr. Place's flight and therefore allowed Mr. Place to depart (Tr. 22). Then, based upon Mr. Place's departing comment that he suspected the officers of being police officers when he saw them back in the lobby area, McGavock rushed to the baggage loading area to get all the information he could from the two name tags on Mr. Place's suitcases (Tr. 22-23).

When Officer McGavock arrived in the baggage area, he located the two suitcases and had 15-30 seconds to write down the identity information on the suitcase name tags (Tr. 55). The information was identical in all respects except Officer McGavock testified one name tag had the street number 1865 while the other had the

street number 1885 (Tr. 56). After taking steps to attach some significance to the address information, Officer McGavock communicated his suspicions about Mr. Place to Agent Gerard Whitmore of the Drug Enforcement Administration in New York (Tr. 27).

Officer McGavock asked Agent Whitmore to meet National Airlines Flight No. 136 at La Guardia International Airport and monitor Mr. Place's activities there and take "whatever action they might deem appropriate based on what I had told him" (Tr. 68). Officer McGavock told Agent Whitmore that he was basing his suspicions mainly on Mr. Place's actions in the lobby—staring and looking around closely at the people in the lobby and relating he had picked out 4 or 5 individuals as police officers (Tr. 67).[2]

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[2]The Drug Courier Profile was created in 1974 by DEA agents in Detroit. *United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976), *Aff'd*, 556 F.2d 385 (6th Cir. 1977). A similar profile was created by DEA Agent Paul Markonni in Atlanta. *United States v. Elmore*, 595 F.2d 1036, 1039 n. 3 (5th Cir. 1979). The Markonni profile consists of seven primary characteristics and four secondary characteristics. The primary characteristics are:

1) arrival from or departure to an identified source city;
2) carrying little or no luggage or large quantities of empty suitcases;
3) unusual itinerary, such as a rapid turnaround time for a very lengthy trip;
4) use of an alias;
5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags;
6) purchasing airline tickets with a large amount of small denomination currency; and
7) unusual nervousness beyond that ordinarily exhibited by passengers.

Noteworthy is the fact that at the time Mr. Place was confronted by McGavock and Facchiano in Miami, he fit characteristic (1) as did everyone else travelling to or from Miami by air that day, and characteristic (7), although Mr. Place's nervousness was not quantified as "beyond that ordinarily exhibited by passengers." Otherwise, Mr. Place appeared to have been an unlikely candidate for being a suspect for the Drug Courier Profile.

2. Some two and one-half to three hours later, Gerard Whitmore, an agent with the Drug Enforcement Administration, watched passengers deplane from National Airlines Flight No. 136 arriving at La Guardia International Airport from Miami (Tr. 21 & 75). Agent Whitmore was accompanied by another agent, Alfredo Iglesias, who also surveilled passengers exiting this particular flight (Tr. 75). Both Agent Whitmore and Agent Iglesias were specifically looking for a person previously described to them and identified for them as Raymond J. Place (Tr. 76). The surveilling of this particular flight and the individual monitoring of Raymond J. Place's activities were the direct result of a telephone

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(Footnote 2 Continued)

The secondary characteristics are:

1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport;
2) immediately making a telephone call after deplaning;
3) leaving a false or fictitious call-back telephone number with the airline being utilized; and
4) excessively frequent travel to source or distribution cities.

conversation between Whitmore and Officer Robertson McGavock (Tr. 104). In the telephone conversation between McGavock and Whitmore, Officer McGavock informed Agent Whitmore that a passenger identifying himself as Raymond J. Place was aboard National Flight No. 136. Agent Whitmore was also given a description of Raymond J. Place and was asked to meet Flight No. 136 when it arrived at La Guardia and to monitor Raymond J. Place when he deplaned (Tr. 104-105). The basis for the request by Officer McGavock that Agent Whitmore meet Flight No. 136 and monitor Mr. Place's activities was Officer McGavock's suspicions aroused by Mr. Place's activities while at Miami International Airport prior to boarding Flight No. 136. Agent Whitmore had no previous knowledge of Raymond J. Place other than that he received from Officer McGavock (Tr. 106). Agent Whitmore planned to observe Raymond J. Place and determine in his mind if Mr. Place was, indeed, acting suspicious (Tr. 106).

Raymond J. Place was among the first 25 or 30 passengers deplaning Flight No. 136 (Tr. 106). Agent Whitmore observed Mr. Place "looking around, and thought such activity was extremely unusual" (Tr. 108). However, Agent Whitmore admitted that had he not been specifically seeking out and then observing Mr. Place, his attention may not have been drawn to this particular passenger (Tr. 109).

According to Agent Whitmore, surveillance of Mr. Place was not continuous, but was voluntarily broken off between the deplaning area and the baggage claim area. During this interim period when Mr. Place was not being surveilled, Agent Whitmore positioned himself

outside the railing surrounding National Airlines baggage claim area (Tr. 77). Shortly after taking up this position, Agent Whitmore observed Mr. Place approach the baggage claim area from the direction of an adjoining baggage claim area. Once Mr. Place arrived at the designated baggage claim area, Agent Whitmore continued to be suspicious because of Mr. Place's scanning of the area (Tr. 77-78).

When National Airlines Flight No. 136 baggage began arriving, Raymond J. Place proceeded to collect his two suitcases after they appeared on the carrousel (Tr. 78-79). Mr. Place then presented the security person with his baggage claim stubs and began to walk away from the National Airlines baggage area toward the TWA baggage area (Tr. 79-80). Agents Whitmore and Iglesias exchanged glances and head nods and then proceeded to follow Mr. Place to TWA's baggage claim area. When Mr. Place reached the TWA baggage area, he placed a call on a direct-line limousine service telephone (Tr. 83). The decision to approach Mr. Place for purposes of interviewing him was made by Agent Whitmore when he observed Raymond J. Place complete this limousine telephone call (Tr. 83). Agent Whitmore testified that the purpose of the interview was to have Mr. Place explain his suspicious activity (Tr. 127).

When the investigatory stop was initiated Agent Whitmore produced his own credentials and identified himself as a federal narcotics agent to Mr. Place. Agent Whitmore testified that Mr. Place asked him "why we [Whitmore and Iglesias] had stopped him" (Tr. 84). In response to Mr. Place's question, Agent Whitmore informed him that information had been received from

the Dade County Public Safety Department, and that "based on observations that Agent Iglesias and [Whitmore] had made at the airport, that [Whitmore] was under the belief that there was a possibility that he was carrying narcotics" (Tr. 84). Mr. Place was next asked whether the luggage he had with him belonged to him, and then he was asked to produce identification and his airline ticket (Tr. 85). Mr. Place was never asked to explain why he was scanning the area or why he appeared to be nervous, even though the purpose of the interview was to allow him an opportunity to offer such explanations (Tr. 126-127). The airline ticket and the drivers license produced by Mr. Place confirmed the information already communicated to the agent by Officer McGavock. Indeed, Agent Iglesias ran a NCIC computer check utilizing the information provided by Mr. Place's drivers license and determined that there was no basis for holding Mr. Place for further questioning (Tr. 92).

The agents seized the two suitcases possessed by Mr. Place and acknowledged by Mr. Place to belong to him. This seizure was without the consent of Mr. Place (Tr. 128). Agent Whitmore also admitted his intention to take custody of the two suitcases regardless of whether or not Mr. Place consented to the seizure (Tr. 129).

3. The Court of appeals was particularly disturbed by the "high-handed" procedure which Agents Whitmore and Iglesias utilized when seizing Mr. Place's luggage (Pet. App.A, 18a-19a). The agents lied to Mr. Place by informing him that they were taking his luggage to a federal judge when, in fact, the agents were taking Mr. Place's personal effects to J.F.K. Airport, where they intended to subject the luggage to a so-called "sniff search" by a dog trained to detect controlled substances.

Also, the court of appeals was certainly aware in reaching its decision that other circuits, which had been called upon to determine this same legal issue, had relied upon this Court's decision in *United States v. Van Leeuwen*, 397 U.S. 249 (1970). However, the court of appeals likewise was aware that not only were the facts supporting this Court's decision in *Van Leeuwen* clearly distinguishable from the facts present in the case at hand, but also, was aware, and took efforts to point out, that the cases emanating from the other circuits were factually distinguishable in several critical ways from Mr. Place's situation (See Pet. App. A, 20-a21a).

In reversing the judgment of conviction, the court of appeals succinctly summarized its position by stating:

> It is simply not a 'temporary detention for investigative purposes' when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment rights (*id.* at 21a).

## SUMMARY OF ARGUMENT

The basic premise of the Government's argument is that the Fourth Amendment does not require that searches or seizures be based on probable cause. A review of this Court's early decisions requires that the Government's argument be rejected. The protections of the Fourth Amendment are applicable not only to the privacy interests necessarily invaded by searches, but also to the property interests violated by seizures.

Historical precedent which has established the probable cause requirement of the Fourth Amendment as a fundamental right, was recently reconfirmed by this Court's decision in *United States v. Ross*, ____ U.S. ____, 102 S.Ct 2157 (1982). Probable cause continues to be a prerequisite to any seizure employed for the purpose of conducting a search of items of personalty.

The Government also urges this Court to expand the exception to the probable cause requirement which was first expressed by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The expansion of the so-called *Terry* exception to the probable cause requirement which is urged by the Government is not consistent or compatible with this Court's decisions. This Court continues to jealously guard the "narrow scope" of the *Terry* exception and to sanction nothing other than extremely brief and localized seizures of persons and not property. *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

Thoughtful reflection about the forseeable consequences of allowing seizures such as the one which is the subject of this case, leads only to the conclusion

that seizures of items of personalty directly from an individual's possession are substantially more offensive to Fourth Amendment rights than those ever contemplated by *Terry* or its progeny.

## ARGUMENT

### THE WARRANTLESS SEIZURE OF RAYMOND PLACE'S LUGGAGE BY LAW ENFORCEMENT AUTHORITIES ACTING WITHOUT PROBABLE CAUSE VIOLATED FUNDAMENTAL FOURTH AMENDMENT PROTECTIONS.

#### A. Fourth Amendment Protections Extend To Both Searches And Seizures.

In its brief, the Government presents for this Court's consideration an interpretation of the Fourth Amendment which must initially be viewed as *novel* and thereafter rejected as *untenable.* At the core of the Government's argument is the statement that "[b]y its terms, then, the Fourth Amendment does not require that searches or seizures be based on probable cause" (Br. 15). Initial support for this assertion is sought through the presentation of a whittled down version of the Fourth Amendment in which the warrant and probable cause requirements have been pared away.[3] This essential theme of the Government's argument is without historical

[3]The government states that "[t]he substantive command of the Fourth Amendment prohibits 'unreasonable searches and seizures' but does not further define the term 'unreasonable' " (Br. 15).

or contemporary precedent and is an attempt to ignore—indeed delete—well established and jealously guarded fundamental rights guaranteed by the Fourth Amendment. *See, Katz v. United States*, 389 U.S. 347 (1967); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Mincey v. Arizona*, 437 U.S. 385 (1978); *United States v. Ross*, ____ U.S. ____, 102 S.Ct. 2157 (1982).

The depth and breath of Fourth Amendment protections were recognized and established by straight forward language in the case of *Boyd v. United States*, 116 U.S. 524 (1886). Justice Bradley, rendering the opinion of the Court, stated:

> It is not the breaking of [an individual's] door, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . *id.* at 532.

In *Boyd*, a statute which compelled the production of incriminating documentary evidence was being examined by this Court. The statute which was under scrutiny by this Court required the production of documentary evidence absent a showing of probable cause. Utilizing Lord Camden's discussion of indiscriminant seizures in *Entick v. Carrington*, 19 How. St. Tr. 1029, Justice Bradley reflected that "[in] order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent

history of the controversies on the subject, both in this country and in England." The subject of such reflection was the practice of issuing writs of assistance which placed "the liberty of every man in the hands of every petty officer." By analogizing the statute under security in *Boyd* to the writs of assistance, and by identifying both as illegal and unconstitutional practices, the early precedents of this Court clearly emphasized the Fourth Amendment's protection against the seizure of property without probable cause. *See also, Weeks v. United States*, 232 U.S. 383 (1914); *Gouled v. United States*, 255 U.S. 298 (1921); *Taylor v. United States*, 286 U.S. 1 (1932).

The tenor of this Court's early Fourth Amendment decisions is accurately reflected by the following statement in *Weeks v. United States, supra* at 344:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the Courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The probable cause requirement has always been a focal point for this Court's Fourth Amendment decisions, since it is the absence of probable cause which leads to stealthy encroachments upon the Fourth Amendment rights of the individual.

The Constitutional principles ennunciated in this Court's early decisions defining the depth and breath of Fourth Amendment rights—namely, that the protections of the Fourth Amendment are applicable not only to the privacy interests necessarily invaded by searches, but also to the property interests violated by seizures—were firmly established in *Gouled v. United States, supra* at 304:

> [S]uch rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or well-intentioned, but mistakenly over-zealous, executive officers.

The argument which is presented by the Government in its brief ignores the historical decisions of this Court which have established the probable cause requirement of the Fourth Amendment as a fundamental right. Once selecting a course which blindly ignores the logic and reasoning of this Court's earlier Fourth Amendment decisions, the Government's argument focuses on this Court's decisions which have allowed searches and seizures in the absence of probable cause. Not

unexpectedly, the Government's argument urges an expansion of the exception to the general rule of probable cause and thereby implicitly promotes the replacement of the probable cause requirement with the discretionary subjective sense of suspicion "of every petty officer."

This Court's recent decision in *United States v. Ross, supra*, unequivocally confirms a continued dedication to the Fourth Amendment's probable cause requirement. The Court's commitment to the probable cause requirement leaves no doubt that the argument put forth by the Government must be rejected as untenable. Indeed, the Government acknowledges that probable cause continues to be a prerequisite for searches directed at so-called areas of reduced privacy expectations (Br. 16 n. 9). "[T]he general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 700 (1981). Exceptions to the probable cause requirement are few.[4] The Government attempts to create a new exception

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[4]One example is an inspection or administrative search, commonly conducted by health, fire, or safety inspectors pursuant to a governmental regulatory scheme. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (Upheld inspection search without probable cause that a particular dwelling violated a housing code). A second type of search permitted without probable cause is the border search. *United States v. Ramsey*, 431 U.S. 606 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The third and potentially most far-reaching type of search excepted from the probable cause requirement is the "stop and frisk" under which a law enforcement authority may seize a person if there exists a reasonable and articulable suspicion that such individual is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). The administrative and border search exceptions are inapplicable to this case; the *Terry* exception is discussed *infra*.

to the probable cause requirement by continuing its effort to create an unprecedented and fictitious dichotomy between searches and seizures. The Government reasons that "[b]ecause the principle Fourth Amendment interest in a bag or package is in the privacy of its contents, this distinction between searches and seizures is particularly marked in the area of seizures of effects (Br. 22). However, this Court's decisions in *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), *Colorado v. Bannister*, 449 U.S. 1 (1980) and *United States v. Ross*, *supra*, gut the very foundations of such argument. *Ross*, *Sanders* and *Chadwick* are cases dealing with the seizures and searches of personal luggage *vis-a-vis* the probable cause requirement. In each of these cases, this Court unequivocally reaffirms the principle that probable cause is a prerequisite to a seizure employed for the purpose of conducting a search of items of personalty, and this is true whether such items are found in a car, arrive at a train station, or are picked up at an airport.

### B. The *Terry* Exception To The Fourth Amendment's Probable Cause Requirement Is Not Applicable To Seizures Of Items Of Personal Luggage.

In the landmark decision of *Terry v. Ohio*, 392 U.S. 1 (1968), this Court created a narrow exception to the probable cause requirement. Such exception permitted a brief "on-the-spot" investigative stop of an individual by law enforcement authorities under circumstances where probable cause did not exist but the officers were armed with sufficient specific articulable facts to

justify a reasonable suspicion that the person stopped was in engaged in criminal activity. *See also, Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1967); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968). The creation of such exception was justified by concluding that when balancing the public's interest in protection from crime against the individual's right to security of his person and effects, such intrusion was so minimal *vis-a-vis* traditional arrests and seizures that limited leeway should be permitted in the interest of law enforcement. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

> The narrow intrusions involved in those cases [*Terry* and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause [Citation omitted] only because these intrusions fell far short of the kind of intrusion associated with an arrest. *id.* at 212.

Indeed, this Court in *Brignoni-Ponce, supra*, rejected the Government's argument which urged an expansion of the exception to the general rule of probable cause. The Court stated:

> The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent*

*or probable cause. United States v. Brignoni-Ponce*, 422 U.S. at 881 (1975) (Emphasis added).

Furthermore, the expansion of the probable cause exception urged by the Government in *Brignoni-Ponce* was significantly less than that being proposed in this case.

Hand-in-hand with the suggestion that seizures are less intrusive than are searches, the Government asserts that "[b]ecause the temporary seizure of luggage is so much less intrusive than that of a person, the point at which prolongation of the seizure becomes unreasonable in the absence of probable cause is considerably more distant" (Br. 26). These assertions cannot withstand thoughtful examination. First, an ongoing traveler assumes that his suitcases will travel with him. *See, United States v. McCain*, 556 F.2d 253 at 255 (5th Cir. 1977).[5] Therefore, a seizure of a traveler's luggage is a coextensive seizure of the traveler. A traveler's luggage cannot be detained within the parameters of *Terry* unless the traveler is detained; therefore, contrary to the Government's conclusion, such a seizure is arguably more intrusive than the so-called *Terry* stop.

Second, when law enforcement authorities seize an item of personalty in the absence of probable cause, the owner of such item is forced to select a course of action which is Constitutionally repugnant; namely, the owner must consent to an on-the-spot search based

[5]Even the "ubiquitious" Agent Whitmore agrees with this statement (Tr. 131).

on less than probable cause or, in the alternative, be detained for an indeterminate period of time.

In this same vein, the Government has the audacity to suggest that it would have been unreasonable in the particular circumstances of this case to bring a dog to La Guardia Airport for the purpose of conducting an immediate "sniff search" in the event Mr. Place's bags were detained. The Government has even implicitly suggested that when balancing the individual's right to be free from arbitrary interference by law enforcement officers against governmental interests in ferreting out crime, factors for consideration include the following: 1) that the DEA does not maintain a drug detecting dog program, 2) that a dog is often unnecessary in the investigations which are commenced, and 3) that the cost of training a dog and stationing a dog and handler at an airport such as La Guardia would be totally out of proportion to the amount of use they would receive (Br. 32-33). These factors are apparently considered by the Government to tip the scales in its favor when balanced against an individual's Constitutional right to be free from arbitrary interference by law enforcement authorities. Additionally, the Government offers an excuse for its conduct by stating "the detention here was not extended any longer than necessary" (Br. 31). In fact, the rationale for the narrowly defined intrusions involved in *Terry* and its progeny is not whether a detention was extended any longer than necessary. An excuse is warranted in the instant case solely because of the fact that Mr. Place's personal luggage was seized on a mere suspicion, was transported to a secured search area about which he was misinformed, was not told when his personal luggage would be returned, and he

was, for all intents and purposes, rendered immobile as a traveler.

The Government also seeks support for its argument which urges an expansion of the *Terry* exception by citing *United v. Klein*, 626 F.2d 22 (7th Cir. 1980) and other courts of appeals which have followed *Klein*. *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981); *United States v. West*, 651 F.2d 71 (1st Cir. 1981); *United States v. Viegas*, 639 F.2d 42 (1st Cir.1981). In *Klein*, which is the seminal case giving rise to the conflict between the various courts of appeals, the Court found the principles expressed by this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970) to be controlling. Such is not the case. First, this Court's decision in *Van Leeuwen* was specifically limited to the facts of that case. Such a limitation severely restricts the *Van Leeuwen* decision as precedent. *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Second, in *Van Leeuwen* the detention which was the focal point of this Court's decision, was directed at two packages left with a postal clerk for first class mailing. The postal clerk who accepted the two packages for mailing became suspicious and informed a policeman of his suspicions about the packages. The two packages were then detained while the officer conducted an investigation in an attempt to establish probable cause supporting the issuance of a warrant authorizing a search of the two packages. A critical factor distinguishing the detention of the two packages in *Van Leeuwen* from the seizures in *Klein, Martell, West, Viegas*, and the instant case, is that in *Van Leeuwen* probable cause to search the packages was established through means independent of the packages themselves; whereas, in

*Klein* and its followers, and in this case, probable cause to search the pieces of luggage was established by investigative means directed solely at the detained pieces of luggage. In *Van Leeuwen* the packages were detained so that they could be searched once the authorities had obtained a warrant based on probable cause ascertained independently of the detention. In this case, Mr. Place's personal luggage was seized solely for the purpose of attempting to establish probable cause for its search.

Additionally, the detention of the packages in *Van Leeuwen* did not precipitate a correlative detention of their owner; whereas, such was not the case here as evidenced by Mr. Place's immobilization as a traveler. Indeed, this Court has recognized that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Katz v. United States, supra* at 350.

Also, in *Klein* and its followers, the courts failed to recognize the inherent differences existing between detentions of persons and seizures of items of personalty. A person can be stopped without being arrested. In the event a person is arrested, probable cause is required. When property is taken—regardless of whether it is called a detention or a seizure—the owner is immediately and absolutely dispossessed, and that is the type of seizure the Fourth Amendment requires to be based upon probable cause. While seizures of persons can be viewed on a sliding scale, seizures of property are subject to an absolute and objective standard.

In *Dunaway v. New York, supra* at 210, this Court reaffirmed that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." The "narrow scope" of the exception to the general rule requiring probable cause is certainly not what the Government is urging in this case. Accordingly, the warrantless seizure of Raymond Place's luggage by law enforcement authorities cannot be justified absent probable cause.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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No. 81-1617

# In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAYMOND J. PLACE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's (Br. 12-17) and amici curiae's (Br. 12-47)[1] primary assertion is that it is a fundamental principle of the Fourth Amendment that "seizures" may not be effected on less than probable cause. This broad proposition is completely indefensible. As explained in our opening brief (at 15-20), since *Terry* v. *Ohio*, 392 U.S. 1 (1968), it is black letter law that a temporary investigative detention of an individual, which is a "seizure" within the meaning of the Fourth Amendment, may be effected on the basis of less than probable cause, *i.e.*, a reasonable suspicion of criminal activity. And subsequent cases, such as *Michigan* v. *Summers*, 452 U.S. 692, 700 & n.12 (1981), make clear that there is no merit to the contention (Resp. Br. 17-23; Amicus

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[1] References to "amici curiae" and "Amicus Br." refer to the brief filed by the American Civil Liberties Union and the New York Civil Liberties Union.

Br. 37-40) that this principle is limited to the particular facts of *Terry*. Rather, an investigative detention on less than probable cause satisfies the requirements of the Fourth Amendment if it meets the "reasonableness" standard of that provision, and that determination depends on a balancing of the gravity of the intrusion against the legitimate government interests served thereby. See, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 653-655 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

a. To support their contention that even temporary seizures almost invariably require probable cause, both respondent and amici rely on numerous cases holding that *searches* of buildings or of personal effects require probable cause. These cases, of course, are completely inapposite. Each of the older cases relied upon (see Resp. Br. 13-16; Amicus Br. 27-31) involved the seizure of personal property incident to a warrantless search of a home, office, or similar building. The Court in those cases plainly did not consider at all the propriety of the seizure standing apart from the antecedent search; indeed, if it had, it undoubtedly would have concluded that the seizures themselves were justified, albeit tainted by the illegal search. Clearly then, those cases cast no light on the question presented here — whether law enforcement officers may temporarily detain for purposes of further investigation personal property found in a public place, based on a reasonable suspicion that it contains contraband.[2]

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[2]Amici's assertion (Br. 31) that *Taylor* v. *United States*, 286 U.S. 1 (1932) is "closely analogous" to this case is quite remarkable. In *Taylor*, the Court held (and the Solicitor General agreed (*id.* at 5)) that it was an "unreasonable" search and seizure for police to break into a garage without a warrant, search it, and seize the contraband that they found there.

The recent cases relied upon (see Resp. Br. 16-17; Amicus Br. 33-38) are equally irrelevant. In fact, those cases generally focus only on the procedural question whether a warrant is required for a particular search; that the substantive standard required for the search is probable cause was not in dispute. See, *e.g., United States* v. *Ross,* No. 80-2209 (June 1, 1982); *United States* v. *Chadwick,* 433 U.S. 1 (1977).[3] The Warrant Clause of the Fourth Amendment plays no role in this case, of course; neither respondent nor amici dispute the proposition (see Pet. Br. 19-20) that a warrant generally is not required for the permanent seizure in a public place of either a person or his property, much less for a temporary detention. In any event, we do not dispute that a permanent seizure of property must be justified by probable cause, just like an arrest. Rather, we contend that, like an investigative detention of a person, a temporary investigative detention of property may be reasonable if based on reasonable suspicion.

The underlying premise of respondent's reliance on these search cases is that the probable cause standard applies with equal force to seizures as to searches, even temporary seizures (see, *e.g.,* Resp. Br. 11, 16-17).[4] As noted in our opening

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[3]Notwithstanding amici's heavy reliance (see, *e.g.,* Br. 8-10, 47-49, 53-54 & n.34) on *Torres* v. *Puerto Rico,* 442 U.S. 465 (1979), that case has no relevance whatsoever to this one. In *Torres,* the Court struck down a Puerto Rico statute authorizing police to search the luggage of any person arriving from the United States. The Court rejected the arguments that the Fourth Amendment did not apply in Puerto Rico (*id.* at 468-471), and that the searches were analogous either to customs searches at international borders or to administrative inspections (*id.* at 472-473). Its ultimate conclusion that the searches therefore were "unreasonable" within the meaning of the Fourth Amendment in the absence of probable cause followed inexorably from prior precedent (see *id.* at 472) and provides no support for respondent's position here.

[4]Contrary to respondent's assertion (Br. 17), the seizure in this case was for the purpose of conducting an investigation, not a search. At the time the luggage was seized, it was not clear that it would ever be

brief (at 22), that equation makes little sense. A search involves a permanent invasion of privacy; once an individual's personal effects have been examined, the information that he may have wished to protect cannot be made private again. A seizure, on the other hand, involves an interference only with a person's freedom of movement or with his possessory interest in property and only for the period of the seizure; that interference ends when the seizure is terminated. Because the consequences of a search are both more lasting and more intrusive than those of a seizure of limited duration, a temporary detention may reasonably be justified by a level of suspicion that would not reasonably justify a search. Cf. *Payton* v. *New York*, 445 U.S. 573, 587 (1980) (warrantless seizure in public place "presumptively reasonable" because no invasion of privacy); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967) (principal object of Fourth Amendment is protection of privacy); *Walter* v. *United States*, 447 U.S. 649, 654 (1980) (footnote omitted) ("an officer's authority to possess a package is distinct from his authority to examine its contents"). For example, individuals in an automobile may be stopped for questioning (*i.e.*, "seized") on the basis of suspicion that would not justify a search of the car. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, 567 (1976); *United States* v. *Ortiz*, 422 U.S. 891, 896-897 (1975); compare *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 884 (stop may be based on reasonable suspicion), with *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 269-270 (1973) (search requires probable cause).

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searched. The search of respondent's luggage that eventually took place was based on probable cause and pursuant to a warrant, and there can be no challenge to its validity except by attacking the antecedent seizure. The cases cited by respondent (Br. 17), in which the search itself was challenged as unreasonable, do not involve the validity of a seizure independent of a search and are inapposite here.

b. Amici also maintain (Br. 16-26) that the origins of the Fourth Amendment demonstrate that one of its primary purposes was to forbid any seizure without probable cause — a purpose that would be "swallow[ed]" (Amicus Br. 11) if the decision below is affirmed. In fact, the historical background of the Amendment lends no support to this thesis.

As this Court has discussed on other occasions, the Fourth Amendment was the constitutional response to two hated practices of the 18th Century — the writs of assistance that had given customs officials blanket authority to search where they pleased for goods smuggled into the colonies in violation of British tax laws, and the general warrants in England that had allowed the blanket search of the premises of all persons connected with publication of a particular libel. See *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977); *Stanford* v. *Texas*, 379 U.S. 476, 481-484 (1965); see generally N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937); T. Taylor, *Two Studies in Constitutional Interpretation*, 24-44 (1969); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361-365 (1921). Thus, the particular abuses at which the Fourth Amendment was directed involved the use of overbroad warrants to authorize an entry into premises, usually the home, for the purpose of conducting a search and seizing evidence. The response of the drafters of the Bill of Rights was the Warrant Clause, which requires specificity in search warrants and establishes the probable cause standard for their issuance.

Although it is true that these 18th Century abuses concerned the seizures of property from private areas as well as the blanket searches authorized by the general warrants, it is clear that the drafters of the Fourth Amendment did not direct any particular attention toward the seizure of personal property voluntarily removed by its owner to a public place, much less the temporary detention of such property

involved in this case. Such a warrantless seizure is governed not by the Warrant Clause, but by the Fourth Amendment's proscription against "*unreasonable* searches and seizures" (emphasis added). Amici's assertion (Br. 17, 24-25) that the drafters of the Fourth Amendment contemplated that any seizure would be "unreasonable" under this clause in the absence of probable cause does not accord with the text of the Constitution (cf. *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976) (warrant requirement linked textually to probable cause standard)) and is not supported by any authority at all.[5]

To the contrary, there is ample evidence that the drafters of the Fourth Amendment contemplated that warrantless searches and seizures could be reasonable in the absence of probable cause. See generally T. Taylor, *Two Studies in Constitutional Interpretation, supra*, at 39-44. The customs statute enacted by the first Congress authorized designated officials to search ships suspected of containing goods subject to duty and to seize any such goods found. These searches and seizures could be conducted without a warrant on the basis of "reason to suspect" the concealment of such goods. See Act of July 31, 1789, ch. 5, Section 24, 1 Stat. 43. This recognition of the right to conduct warrantless seizures — indeed, searches — in the absence of probable cause carries great weight as a matter of constitutional interpretation because it was enacted by the same Congress that proposed the Fourth Amendment. See *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). In light of this statute, it seems eminently reasonable that a police officer should be

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[5]Amici erroneously cite (Br. 24 n.18) N. Lasson, *supra*, for the proposition that the version of the Fourth Amendment contained in the 1776 Pennsylvania Declaration of Rights impliedly protected against all searches and seizures not based on probable cause. In fact, Professor Lasson states that "[t]he word '*unreasonable*' is imputed." N. Lasson, *supra*, at 81 n.11 (emphasis added).

permitted temporarily to detain suspected contraband found in a public place for the purpose of further investigation that will confirm or dispel his suspicion. At a minimum, it is clear that the history of the Fourth Amendment does not suggest an irreducible prerequisite of probable cause for all conduct that constitutes a "seizure."

2. Respondent contends (Br. 19) that it is per se "unreasonable" for an investigative detention of personal property based on reasonable suspicion to continue any longer than could a *Terry* stop of a person. As explained in our opening brief (at 20-26), this assertion defies common sense because a baggage detention unquestionably is significantly less intrusive than a detention of a person. The basis for respondent's contention is his repeated assertion (Resp. Br. 19-20, 21, 22) that a traveler necessarily is "immobilized" if his luggage is detained. This statement misconceives the procedure that occurred here; the whole point of an investigative detention of luggage is to permit a police officer to confirm or dispel his reasonable suspicion of criminal activity *while allowing the person involved to proceed on his way*. The record unequivocally demonstrates that that is precisely what happened here; respondent chose not to remain with the DEA agents while they arranged for the dog sniff, explaining that he had "pressing engagements" (see J.A. 6).

As noted in our opening brief (at 20-21), this Court has already recognized in *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the principle that police may effect an investigative detention of luggage independent of any seizure of the person. Respondent's proferred distinction of *Van Leeuwen* (Resp. Br. 21-22) does not undermine this principle. The fact that the investigation in this case focused on the detained luggage itself raises an independent question whether that investigation comported with the Fourth

Amendment,[6] but obviously it is irrelevant to the validity of the detention itself, which turns on a balancing of the intrusion occasioned by the *detention* against the public purpose served thereby. Amici suggest (Br. 41-43) that *Van Leeuwen* is inapposite here because respondent's suitcase was seized while it was in his possession. But surely the question presented here would not be significantly different if the DEA agents had seized the luggage directly from the baggage carousel instead of shortly after respondent claimed it. The critical question is still the reasonableness of the intrusion created by the deprivation of respondent's possession of his luggage for the period of the detention. As explained in our opening brief (at 26-36), that limited intrusion was justified by the strong government interest in maintaining the status quo for a limited time in order to conduct a specific course of investigation to confirm or dispel the reasonable suspicion that the luggage contained contraband.

3. Respondent and amici object that investigative detentions of luggage on the basis of reasonable suspicion are necessarily "unreasonable" because they are an "arbitrary interference by law enforcement authorities" (Resp. Br. 20) or are committed to an officer's "unbridled discretion" (Amicus Br. 51, 60-62). This objection is without foundation. There was nothing arbitrary about the decision to detain respondent's luggage. It rested upon a well established Fourth Amendment standard, namely, articulable facts creating a reasonable suspicion of criminal activity,

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[6]For example, a search of respondent's luggage based on reasonable suspicion would have been unlawful. There is no question, however, of the lawfulness of the dog sniff performed here. The overwhelming weight of authority holds that a dog sniff is not a "search" at all (see, *e.g., United States* v. *Johnson*, 660 F.2d 21, 22 (2d Cir. 1981)), and even the most restrictive view is that a dog sniff may be performed on the basis of reasonable suspicion. See *United States* v. *Beale*, 674 F.2d 1327 (9th Cir. 1982), petition for cert. pending, No. 82-674. See also Pet. Br. 31 n.18.

and the finding of reasonable suspicion was subject to judicial review. See *Terry* v. *Ohio, supra,* 392 U.S. at 21-22.

It is true, of course, that the initial finding of reasonable suspicion was made by law enforcement officers, not by a neutral and detached magistrate (cf. *Dunaway* v. *New York,* 442 U.S. 200, 213-214 (1979)), but surely that cannot suggest that the determination was "arbitrary." The situation in which the need for an investigative detention arises obviously calls for the law enforcement officer to make the initial determination of suspicion, and there is no contention that resort to the prophylactic measure of a warrant is appropriate in this context. Indeed, if it is the exercise of judgment by law enforcement officers that constitutes "arbitrariness," the situation would not be improved at all by accepting respondent's position and imposing the higher standard of probable cause.

4. Amici mistakenly assert (Br. 52-54) that the justification for the temporary detention here is different from that recognized in *Terry* and its progeny. To the contrary, the government interest involved here — the prevention of a crime that police reasonably suspect is about to be committed — is precisely the same interest that justified the stops in *Terry* and its progeny. See also *Michigan* v. *Summers, supra,* 452 U.S. at 698-701; *United States* v. *Cortez,* 449 U.S. 411, 417 (1981); *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 878-882. As the Court stated in *Adams* v. *Williams,* 407 U.S. 143, 145 (1972), "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."

## CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

*Petitioner*

—v.—

RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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## INTEREST OF AMICI[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the principles of freedom and democracy embodied in the Bill of Rights. The New York Civil Liberties Union is the New York state affiliate of the ACLU, with a membership of 20,000.

Among the freedoms guaranteed by the Bill of Rights is the right to be free from unreasonable government searches and seizures. The Fourth Amendment erects a critical barrier between the government and the citizen, defining the standard the government must meet whenever it seeks to invade "the right of the people to be secure in their

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1/ Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

persons, houses, papers, and effects ...."

The ACLU and NYCLU have repeatedly urged upon this Court a "strict construction" of that Amendment. In this case, the United States strays far indeed from such a construction, urging this Court to depart from the traditional rule, forged in the colonial period and the struggle over the writs of assistance, that persons have a right to be free from seizures of personal property absent probable cause. It is the purpose of this brief to demonstrate that the arguments made to support the Government's position are without merit. Whatever may be the case for the kind of brief "detentions" of luggage in connection with the brief investigative stops sanctioned in Terry v. Ohio, 392 U.S. 1 (1968) and its progeny, stops that "usually consum[e] less than a minute", Dunaway v. New York, 442 U.S. 200, 210-

211 (1979), probable cause is constitutionally required to justify the lengthy seizure of property involved here.

## STATEMENT OF THE CASE

Only one relevant fact is not adequately set forth in the decision of the Court of Appeals, 660 F.2d 44 (2nd Cir. 1981).

Agent Gerard Whitmore, the DEA agent based at La Guardia Airport contacted by Miami detectives after they became suspicious of Mr. Place, was the arresting officer in all except one of the airport search cases that reached the Second Circuit between 1977 and the present. See, e.g., United States v. Vasquez, supra, cert. den. 447 U.S. 907 (1980); United States v. Vasquez-Santiago, 602 F.2d 1069 (2nd Cir. 1979), cert. den. 447 U.S. 911 (1980); United States v. Price, 599 F.2d 494 (2nd Cir. 1979);

United States v. Rico, 594 F.2d 320 (2nd Cir. 1979); United States v. Riqueliny, 572 F.2d 947 (2nd Cir. 1978); United States v. Buenaventura-Ariza, 615 F.2d 29 (2nd Cir. 1980); United States v. Forero-Rincon, supra; United States v. Place, 660 F.2d 44 (2nd Cir. 1981); United States v. Garcia, 450 F. Supp. 1020 (E.D.N.Y. 1978); United States v. Flores, 462 F. Supp. 702 (E.D. N.Y. 1978); United States v. Oyala, 77 Cr. 569 (E.D.N.Y. Dec. 21, 1977), aff'd 594 F.2d 853 (2nd Cir. 1978); United States v. Medina, 77 Gr. 460 (E.D.N.Y. Nov. 29, 1977). He has been termed "one very active DEA agent," United States v. Vasquez, 612 F.2d 1338, 1351 (2nd Cir. 1979) (Oakes, J., dissenting), and "ubiquitious", United States v. Forero-Rincon, 626 F.2d 218, 220 n.4 (2nd Cir. 1980). Agent Whitmore's experience at La Guardia Airport has been

so active as to render absurd the government's suggestion (Br. at 32-33) that La Guardia is such a backwater in the DEA struggle against narcotics trade that the regular presence of a trained dog there would be inefficient.

## SUMMARY OF ARGUMENT

The exception the Government seeks here to the general requirement that more-than-momentary seizures be based on probable cause is not limited to brief stops at airports. The Government seeks, instead, a broad rule authorizing police seizure of personal property from public places for indefinite periods of time approaching 22 hours, and the removal of such property to distant facilities, so long as investigative procedures performed on the property do not amount to "searches" within the meaning of the Fourth Amendment.

1. The early history of resistance to arbitrary search and seizure in seventeenth and eighteenth century England and the Colonies reveals that the protection of property from seizure absent probable cause was the motivating prin-

ciple leading to the Fourth Amendment. The cases involving John Wilkes, the struggle over the Stamp Act and other British customs and tax measures in the Colonies, and the controversy concerning the Writs of Assistance all refute the Government's suggestion here that seizures of property are lesser Fourth Amendment intrusions, unprotected by the probable cause requirement.

2. This Court's early Fourth Amendment precedents faithfully reflect that early history, and demonstrate that the probable cause requirement protects seizures and searches of property, whether the seizure is undertaken for purpose of search or vice versa.

3. Although the Court has discarded the early theory that the government could only seize items over which it could establish superior property rights, Warden v. Hayden, 387 U.S. 294 (1967),

it has not deviated from its historic understanding that the Fourth Amendment protects interests in both property and privacy, and that the Fourth Amendment is violated where an individual's legitimate expectations of privacy and security in his property are invaded. Katz v. United States, 389 U.S. 347 (1967); Rakas v. Illinois, 439 U.S. 128 (1978); Torres v. Puerto Rico, 442 U.S. 465 (1979).

Even where exigent circumstances have justified dispensing with the warrant requirement, such as with automobiles on the highways, probable cause has been required to justify more-than-momentary seizure or search. Thus, absent probable cause, the luggage at issue here would plainly have been protected from more than the momentary seizure involved in a Terry stop had it been found in a moving automobile.

Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). Nor would the exceptions to the probable cause requirement established in Terry v. Ohio, 392 U.S. 1 (1968) or its progeny support the broader exception sought by the government here.

4. The Court recently rejected a similar exception to the probable cause requirement in Torres v. Puerto Rico, supra, which Puerto Rico advanced on precisely the grounds on which the United States rests its case here, namely the generalized interest in law enforcement. In any event, applying the analysis set forth in Terry and its successors, the creation of an exception to the probable cause requirement for more-than-momentary detentions of personal property seized from its owner is not warranted. The generalized interest in law enforcement has never supported

such an exception, and the Fourth Amendment makes clear that it could not do so. Torres v. Puerto Rico, supra; Dunaway v. New York, 442 U.S. 200 (1979). The additional justifications relied on in Terry, United States v. Brignoni-Ponce, and Michigan v. Summers, 452 U.S. 692 (1981) -- officer safety, special border control concerns, or the existence of a closely related magistrate's determination of probable cause -- are wholly lacking here. The intrusion here is severe, far more substantial than the mere detention of property, because the dispossed traveler is necessarily tied, as on a tether, to the officers who seize and remove the property, forced to alter plans and keep in touch with the police so that, when they choose to return the property, he can reclaim it. The seizures contended for by the Government place far more discretion

in the hands of police than do the stops in Terry or its followers, since they are not circumscribed in place and can last far longer . Finally, upholding the seizure in this case would swallow the long-accepted rule, reaching back to the colonial struggles, forbidding seizures without probable cause.

## ARGUMENT

### THE SEIZURE OF PERSONAL LUGGAGE AT AN AIRPORT IN THE ABSENCE OF PROBABLE CAUSE VIOLATES FUNDAMENTAL AND WELL-ESTABLISHED FOURTH AMENDMENT PRINCIPLES.

### Introduction

The Government's argument in this case is as straightforward as it is pernicious: simply put, any person stopped on the street or in any public place under the "reasonable suspicion" standard of Terry v. Ohio, 392 U.S. 1 (1968) and its progeny[2/] could be deprived of a wallet, a handbag, a briefcase, or other personal property, for uncircumscribed investigatory procedures so long as those procedures do not amount to a

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2/ See Adams v. Williams, 407 U.S. 143 (1972); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Michigan v. Summers, 452 U.S. 692 (1981). Cf. Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Mendenhall, 446 U.S. 544 (1980).

"search."[3] If accepted by the Court, that argument would eviscerate the Fourth Amendment "right of the people to be secure in their ... papers and effects ... " by driving a wedge between "searches" and "seizures" of property, removing the largest category of police "seizures" of personal property -- those commenced for the purpose of searching the property -- from the protection of the Fourth Amendment's probable cause standard. Though the Government concedes that probable cause is uniformly required

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[3] This case does not present the question, currently much debated in the lower courts, whether canine sniffing is a "search" within the meaning of the Fourth Amendment. See generally Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir.) and cases cited therein. The respondent challenged the admission of the evidence seized from his luggage solely as the fruit of an unlawful seizure, not as the fruit of an unlawful search, and the judgment below rests on that basis.

to search personal property, it nevertheless contends that the "investigative detention" (i.e., seizure) of property which precedes such a search is permissible under a lesser standard.

The Government's argument is a transparent attempt to transform -- indeed, rewrite -- the Fourth Amendment. It would have the Court radically expand the limited investigatory detentions of persons solely for the purpose of inquiry approved in Terry, by sanctioning lengthy[4/] seizures which intrude upon personal privacy, mobility, property,

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4/ The Government's brief is extremely vague on how long a "temporary detention" must be before it would be subject to the probable cause requirement. We are told that it may be "of longer duration than a detention of a person" (Br. 11). Even if the citation to the 22-hour stop in United States v. Regan, No. 81-1722 (1st Cir. Sept. 1, 1982) (Br. 26) suggests that the Government views that stop there as an outer limit, which is (footnote continued on following page)

and liberty, absent any justification beyond the general needs of law enforcement. In proffering this argument the Government ignores the language, history, traditions and well-established principles repeatedly announced by this Court that are the bedrock of the Fourth Amendment. Instead, the Government argues for a society in which mere police suspicions will authorize lengthy seizures of the personal belongings of those who venture outside of their homes.

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(footnote continued from preceding page) unclear, there is no reason to believe that shorter seizures would require probable cause under the Government's view. Although in this case the police garnered probable cause in shortly under two hours, the length of the detention here is properly measured not by that period, but rather by the time it would have taken Agent Whitmore to return the luggage to Mr. Place (wherever that be) had the dog sniff been unavailing, a minimum of 3-5 hours, or perhaps by the time Mr. Place was informed the detention might last -- i.e., indefinitely.

A. The Language And The Historical Underpinnings Of The Fourth Amendment Demonstrate That The Full Panoply Of Its Protections Apply Not Only To Search But Also To Seizure Of Property.

At the outset of its brief, the Government sets out only the clause of the Fourth Amendment concerning unreasonable searches and seizures, wholly omitting the warrant clause and its familiar requirment of probable cause.[5] (Br. 2). As the text of the brief makes clear, the omission is hardly accidental; the premise of the Government's argument is its view that "[b]y its terms, then, the Fourth Amendment does not require that searches or seizures be based on

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5/ "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (emphasis added)

probable cause."[6]

The origins of the Amendment, however, confirm both that the probable cause requirement was the basic criteria of reasonableness, and that the framers' uppermost concern was with the "things to be seized". Contrary to the Government's argument here, the protection from Government excess at which the Amendment was directed had at its root the desire to protect property from seizure absent probable cause.[7]

As leading scholars of the origins of the Fourth Amendment have made clear[8],

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6/ Br. 15.

7/ See generally Warden v. Hayden, 387 U.S. 294, 303-305 (1967).

8/ See Lasson, The History and Development of the Fourth Amendment to the United States Constitution, Johns Hopkins Press (1937), at 37-40 (hereafter "Lasson"); Landynski, Search and Seizure And The Supreme Court, Johns Hopkins Press (1966), (footnote continued on following page)

early resistance to oppressive search and seizure measures focused primarily upon three abuses extant shortly after the restoration of the Crown in England in 1660: writs of assistance were employed to prevent smuggling abuse; a "hearth money tax" was collected by means of forced entry; and seditious libel was rooted out by blanket search and seizure. Through the twenty five years preceding the Revolution of 1688, Charles II caused general warrants and writs of assistance to be issued regularly to garner his revenue and to suppress dissent. When the House of Commons, bridling at these measures, finally took action, it cited Chief Justice Scroggs in articles of

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(footnote continued from preceding page) at 19-30 (hereafter "Landynski"). Both have been frequently relied on by this Court. See, e.g., Payton v. New York, 445 U.S. 573, 583 n.21 (1980); Warden v. Hayden, 387 U.S. at 301 n.9.

impeachment for issuing general warrants authorizing "'seizing the goods of his majesty's subjects, not named or described particularly ....'"[9/]

Not until the middle of the Eighteenth Century did resistance to oppressive search and seizure laws result in formal restraining legislation. Both in England and the Colonies the efforts of the Crown to tax and to control smuggling resulted in the establishment of principles akin to the Fourth Amendment. The colonial legislation was a reaction to England's measures of economic oppression, which had been enforced by unrestricted seizures

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9/ Lasson at 38 (emphasis added). Lasson also relates the 1683 trial of Algernon Sidney, whose writings were seized pursuant to a general warrant, only to have a second search warrant issued authorizing seizure of his personal belongings. Lasson at 39 n.94.

of colonial property.[10/]

Foremost among the events in England were the arguments in the early 1760's of William Pitt against the broad search and seizure provisions of a cider excise tax which, as could be expected, affected much of the population. Riots led to its repeal at

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10/ See generally Lasson at 45-78. These events on this side of the Atlantic coincided with the famous £ 300 jury award in favor of John Entick from whose home seditious writings had been seized. The historic decision of Lord Camden (formerly Chief Justice Pratt) in Entick v. Carrington, which was relied on extensively in the seminal decision of Boyd v. United States, 116 U.S. 616 (1886), expressed the view that personal property, as distinguished from property claimed by the Crown, must be protected against arbitrary seizure pursuant to general warrants. See Warden v. Hayden, 387 U.S. at 303-304; Stanford v. Texas, 379 U.S. 476, 483 (1965). Similarly, the celebrated cases involving John Wilkes rested primarily on the illegal seizures, not merely on the searches involved. See Lasson, at 43-47; Landynski, at 27-28.

the same time that the House of Commons recognized that general warrants were not to be issued. Pitt's crusade in the House of Commons resulted in the formal outlawing of general warrants in 1766.[11]

In the Colonies the struggle against abusive searches and seizures centered directly on the invasion of property interests. The "hated writs of assistance"[12] relied on to enforce customs laws and taxation were the irritant which led to adoption of the Fourth Amendment. Seizures of private property under the writs focused the resistance against England which finally led to the Revolution.[13]

Throughout, the controversy was econ-

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11/ Lasson, at 48-49.

12/ Stanford v. Texas, 379 U.S. at 481.

13/ Landynski, at 31-38; Lasson, at 51-79.

omic. England sought to restrict trade by the Colonies in order to protect the British West Indies; the colonists, on the other hand, smuggled less expensive imports from the non-British West Indies. In 1760, Britain started to use the writs of assistance to enforce the trade laws strictly. Each time a writ was executed and property seized, the Crown was, in essence, claiming colonial property as its own. The colonists were galled that the writs granted unbridled discretion to their enforcers and were completely general in nature, without judicially imposed limits upon time, place or manner of execution.[14/]

In 1764 the English Government changed its colonial policy placing

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14/ Lasson, at 54. The most famous expression of this opposition, of course, is the celebrated argument of James Otis. See Lasson, at 58-61; Landynski, at 34-35.

primary emphasis on taxation of imports rather than customs control.[15] This form of partial relief did not satisfy the colonists, who were committed to the proposition that oppressive seizures of their property were intolerable.

In 1768 England issued the Townsend Acts which eliminated all of the technical and procedural arguments that the colonial lawyers had raised against the issuance of the writs. Nevertheless, even after their enactment, the colonial courts regularly refused to issue the writs and general warrants, despite their clear mandate to do so.[16]

Based on their experience of oppression by unregulated search and seizures, several colonies took action during the Revolution, through their colonial char-

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15/ Lasson, at 67.

16/ Lasson, at 72-76.

ters, to protect their citizens from unrestrained search and seizure.[17] The Pennsylvania charter of 1776 was the first provision nearly approximating the Fourth Amendment.[18] Uniformly, these provisions

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17/ Lasson, 79-82.

18/ Lasson, supra, at 81 n.11 quotes section X of the Pennsylvania Charter as follows:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted.

As Lasson indicates, the clear import of this provision was protection not from all searches and seizures but only from those undertaken without "a sufficient foundation", i.e., probable cause. Id.

addressed themselves not merely to searches, but equally to the protection of property from arbitrary seizure, that is, seizure not based on probable cause. Not surprisingly, the same concern was reflected in the final wording of Fourth Amendment as adopted by the Constitutional Convention in 1790.[19/]

Thus, the Framers' unbroken twenty-year concern with seizures of their property resulted in the establishment of new basic rights. Of course, the invasive searches and unrestrained arrests that accompanied England's efforts to stifle "illegal" colonial activity had provoked and catalyzed resistance. But, historically, it is impossible to deny that it was the underlying interest in preserving their property from seizure

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19/ Lasson, at 101-103.

in the first instance, in limiting searches precisely because they were undertaken for the purpose of seizure, which moved the revolutionaries to action in both England and the Colonies.

B. This Court's Early Precedents Emphasized The Fourth Amendment's Protection Against The Seizure Of Property Without Probable Cause.

In 1886, in Boyd v. United States, supra, the Court interpreted broadly the reach of Fourth Amendment protections. Boyd involved a statute which compelled, without probable cause, production of books and papers which, although not themselves contraband, were nevertheless incriminating evidence. Citing Entick v. Carrington, supra, the Court analogized the procedure to the seizures authorized by the infamous writs of assistance. Justice Bradley declared the statute unconstitutional under both the Fourth and Fifth Amendments and

announced his now famous description of the broad interests protected by the Fourth Amendment:

> It is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property ....

116 U.S. at 630 (emphasis added).[20/]

Several other of the Court's early cases also involved the protection of property interests against seizures without probable cause. In Weeks v. United States, 232 U.S. 383 (1914) the Court held that a conviction based on evidence

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20/ Although "several of Boyd's express or implicit declarations have not stood the test of time", Fisher v. United States, 425 U.S. 391, 405 (1976), see also United States v. Ward, 448 U.S. 242, 253-55 (1980), Justice Bradley's formulation cited above has never been overruled, and remains good law. See, e.g., Katz v. United States, 389 U.S. 347, 350-53 (1967).

seized without warrant from the home of a man who was contemporaneously arrested elsewhere required reversal of his conviction and the return of his personal property. Similarly, in Gouled v. United States, 255 U.S. 298 (1921), seizures of property effectuated by a government officer's stealth in the defendant's were likewise condemned.[21] In both these cases the Court was presented with searches undertaken for the purpose of seizing evidentiary, non-contraband property. The procedure the Court sanctioned to challenge these

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21/ See also Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920), where convictions were reversed because after arrest marshals "made a clean sweep of the office of [defendants'] company ... without a shadow of authority." See also Amos v. United States, 255 U.S. 313 (1920).

seizures was based upon the defendant's petition for the return of his property based on illegal seizure, rather than for its suppression based upon violation of his constitutional right to privacy. E.g., Weeks v. United States, 232 U.S. at 387. Indeed, in Weeks it was not disputed that the arrest of the suspect was based upon probable cause; yet the Court refused to uphold the seizure as incident to that (distant but contemporaneous) arrest, holding instead that the subsequent evidentiary seizure was required to comport independently with the Fourth Amendment's probable cause and warrant standards.

Similarly, the Court consistently required strict adherence to the requirement of probable cause even where property seizure was incident to lawful arrest. In Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and United States

v. Lefkowitz, 285 U.S. 452 (1932), non-contraband personal property was seized as evidence at the site of a concededly valid arrest. Though probable cause to arrest was not in doubt and, consequently, it could be reasonably inferred that the property seized was relevant evidence, the Court nevertheless treated the property as outside the scope of material which the Government could have cause to seize.[22/]

The Court's protection of the right to be free from property seizure absent probable cause can also be seen in cases like Taylor v. United States,

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22/ Gouled and Lefkowitz would be differently decided today in light of the abolition of the mere evidence rule in Warden v. Hayden, supra. However, the point for which the cases are here cited -- the protections long afforded by this Court not only to the privacy interest implicated by searches but also to the property interests implicated by seizures -- remains valid.

286 U.S. 1 (1932). In Taylor, a case closely analogous to the present one in certain respects, a unanimous Court during Prohibition reversed a conviction based on property unlawfully seized even when its odor and complaints from neighbors gave police probable cause to believe that it was whiskey. Although a search was involved, Justice McReynolds' opinion emphasized that both "the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him," and held that "the action of the agents was unexcusable and the seizure unreasonable." 286 U.S. at 6. Indeed, throughout the period of early judicial application of the Fourth Amendment, the Court's focus was usually on the warrant clause precisely because of the Court's perception that faithfulness to it was necessary to protect the Fourth Amendment interest in freedom

from unreasonable seizure of property absent probable cause. See United States v. Lefkowitz, 285 U.S. at 464; Carroll v. United States, 267 U.S. 132, 154 (1925); Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Gambino v. United States, 275 U.S. 310 (1927); United States v. Lee, 274 U.S. 559 (1927).

In short, the Court's early cases reflect the origins of the Fourth Amendment. The Court assiduously protected private property against seizure other than under the probable cause standard. Whether under the warrant requirement or not, and whether search was for the purpose of seizure or vice versa, probable cause remained the touchstone of Fourth Amendment law during the first half of this century.

C. The Court's Recent Cases Have Adhered To The Fundamental Principle That The Seizure Of Personal Property And Effects Must Be Based Upon Probable Cause.

The Court's early understanding that seizures of property were unreasonable absent probable cause has remained unchanged, despite a variety of doctrinal developments expanding in other respects the scope of permissible searches and seizures. Thus, in Warden v. Hayden, abandoning the rule that mere evidence could on no account be seized, the Court nevertheless stressed that probable cause was a prerequisite to valid seizure of property:

> There must, of course, be a nexus--automatically provided in the case of fruits, instrumentalities or contraband--between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehansion or con-

viction.

387 U.S. at 367.[23]

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23/ In displacing early conceptions of Fourth Amendment rights based on superior property rights between a possessor and the Government, the Court stated in Warden v. Hayden that "the principal object of the Fourth Amendment is protection of privacy rather than property", reasoning that "[t]he premise that property interests control the right of Government to search and seize has been discredited." 387 U.S. at 304. However, Hayden's holding that the Government may search or seize (given probable cause) even though it has no superior property right did not mean that protection of property from unjustified search or seizure is not a principal function of the Fourth Amendment, especially where personal property is seized from the very hands of its owner. Neither the reasoning of Hayden nor anything else subsequently decided suggests a result so at odds with logic or history. Indeed, the Court has repeatedly stressed that the Fourth Amendment protects individuals whose property is seized from them unlawfully. See, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979) (seizure and search of luggage at airport); Rakas v.Illinois, 439 U.S. 128, 135-6, 142 n.11, 143 n.12 (1978); Katz v. United States, 389 U.S. at 350-353 and n.4; United States v. Salvucci, 448 U.S. 83 (1980).

Similarly, although the Court has expanded on the rationale of Carroll v. United States and relaxed the warrant requirement for searches and seizures in cases involving narrowly defined exigent circumstances, it has repeatedly emphasized that it could do so without jeapordizing critical Fourth Amendment interests because the bedrock requirement of probable cause to search or seize remained intact. See, e.g., Chambers v. Maroney, 399 U.S. 42, 52 (1970); Coolidge v.New Hampshire, 403 U.S. 443 (1971); Cardwell v. Lewis, 417 U.S. 583 (1974) (seizure of automobile unaccompanied by interior search). Chambers, Coolidge, and Cardwell are especially pertinent here, since in each case personal property considerably less private than luggage -- namely automobiles -- was seized for the purpose of searching for incriminating

evidence. Yet the Court required that the seizures in these cases could only be based upon probable cause, whether in conjunction with a search (Chambers, Coolidge) or not (Cardwell).

The Court's continuing commitment to probable cause as the constitutional prerequisite to such a seizure generally, and especially of personal property like luggage at issue here, was dramatically reaffirmed last term in United States v. Ross, 72 L.Ed.2d 572 (1982). In Ross, both the majority and dissent explicitly agreed, on the basis of United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), that "'a person's expectations of privacy in personal luggage are substantially greater than in an automobile.' [433 U.S. at] 13." 72 L.Ed.2d at 585, 594, 598, 600. Ross, Sanders and Chadwick are all cases about the seizure and search of luggage. Each

unquivocally reaffirms the principle that probable cause is a prerequisite to the seizure for the purpose of search of personal belongings whether these belongings are carried in a car (Ross), arrive at a train station (Chadwick), or are picked up at an airport (Sanders).[24/]

Ross renders the Government's position here nearly insupportable. The United States urges the Court to approve a seizure of luggage, deserving of greater "expectations of privacy" than an automobile, on a basis less protective than probable cause, despite the unbroken line of authority in this Court prohibiting seizures of automobiles based on less than probable cause. The Government commends to this Court a Fourth

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24/ See the discussion of these cases in United States v. Ross, supra, 72 L.Ed.2d at 584-87.

Amendment scheme of seizures in which Mr. Place's luggage would have been protected on the basis of probable cause had he simply placed his bags in an automobile; but, because he did not, he was vulnerable to their seizure on the basis of reasonable suspicion at an airport. After Chadwick, Sanders and Ross, the anomaly of that result is evident.

Of course, the instant controversy would not exist but for the landmark decision of Terry v. Ohio, 392 U.S. 1 (1968), authorizing temporary investigative seizures of persons reasonably suspected of criminal activity. But the rule of Terry was "narrowly drawn" by the Court. 392 U.S. at 27. As such, it represented a constitutional response to a theretofore judicially unexamined aspect of routine police procedure -- the investigative stop -- which could

not be fairly evaluated under the traditional arrest analysis. 392 U.S. at 26-27.[25] For purposes of the instant case, Terry's significance is threefold: the narrowness of the exception created;[26] the fact that by its terms it only applies to seizures (and frisks)

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25/ See also Dunaway v. New York, 442 U.S. 200, 209 (1979).

26/ "[S]uch a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See Preston v. United States, 376 U.S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29.

of persons; and the method by which the Court reached its decision.[27] In none of Terry's progeny, however, has the Court gone beyond Terry's rationale and "narrow scope"[28] and sanctioned anything other than extremely brief and localized seizures of persons. See, e.g., Adams v. Williams, supra (temporary seizure of person in automobile); United States v. Brignoni-Ponce, 422 U.S. 881-82 (temporary stop of automobile for questioning as to "citizenship and immigration status ... but any further detention or search must be based upon consent or probable cause"); Pennsylvania v. Mimms, supra (temporary removal of person from automobile for protection); Michigan v. Summers, 452 U.S. at 705 (limited authority to detain occupants of premises while search is

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[27] Discussed below at Point D, infra.

[28] Dunaway v. New York, 442 U.S. at 210.

conducted under warrant).

To the extent that Terry's progeny represent a recognition that an item of property -- an automobile -- may be momentarily "seized" along with its driver on the basis of reasonable suspicion, nothing in either the facts or reasoning of these cases leads to the conclusion which the Government seeks in this case. Mr. Place does not contest the authority of Agent Whitmore to detain him momentarily for investigation. Likewise, for that moment, Mr. Place also does not contest the concomitant seizure of his luggage. It is the additional lenghty seizure of his personal belongings and their forcible removal to a distant place for an indeterminate length of time which is at issue here. No case previously decided by this Court even begins to justify such an extensive seizure.

The Court's decision in United States

v. Van Leeuwen, 397 U.S. 249 (1970), relied on so heavily by the Government, is inapposite. In Van Leeuwen packages deposited by the defendant in the mail were held up for approximately a day while an investigation was undertaken in order to establish cause to obtain a search warrant. The cause for the detention was a suspicion that the packages contained contraband. Emphasizing that this was a case of voluntary relinquishment of property to the postal service, the Court sustained the seizure on the basis that

> no interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

397 U.S. at 253.

Here, it can hardly be disputed that a "significant Fourth Amendment interest" is involved in the coerced seizure of luggage from the hands of its owner. Mr. Place never voluntarily relinquished his property in a manner similar to that associated with mailing a parcel. Moreover, although the one day delay of mail in Van Leeuwen was well within the time within which mail might be delivered by the government to which it was entrusted, the delay here was not only well beyond that in which domestic travelers reasonably expect access to their luggage, but was also caused by third-party law enforcement officers. Mr. Van Leeuwen, unlike Mr. Place, never expected to have access to his parcels during the day they were delayed.

Were Mr. Place contesting the external inspection of his luggage by DEA agents or their dogs while it was checked

with or being processed by the airline, Van Leeuwen might be applicable precedent. But where, as here, the entire dispute centers on the seizure from Mr. Place's immediate possession of his personal belongings, Van Leeuwen is wholly inapplicable.[29/]

Finally, it is worth noting that not only do the Court's precedents not reach as far as the result contended here by the Government; more importantly, the Court has only recently rejected attempts to stretch the Terry rationale

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29/ The Court in Van Leeuwen specifically limited its ruling to "the facts ofthis case," 397 U.S. at 253, noting that even "detention of mail could at some point become an unreasonable seizure." 397 U.S. at 252. For extensive analysis of the reaons why Van Leeuwen is inapplicable to seizures of luggage at airports, see United States v. Martell, 654 F.2d 1356, 1366-69 (9th Cir. 1981) (Nelson, C.J., dissenting) and Comment, "Seizing Luggage on Less than Probable Cause," 18 American Criminal L. Rev. 637 (1981).

to support more extended seizures absent probable cause. In Brown v. Illinois, 422 U.S. 590 (1975) and Dunaway v. New York, supra, the Court examined the nature and duration of seizures of persons based on reasonable suspicion only, and concluded that the Fourth Amendment precluded such detentions that were longer than momentary and more intrusive than a simple investigative encounter. As the Court recognized in Dunaway, wishful governmental characterization of seizures as less intrusive and extensive than they in fact are cannot dilute the Fourth Amendment's fundamental protections:

> The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." Henry v. United States, 361 U.S. 98 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adop-

> tion of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." Id. at 101. (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. 442 U.S. at 213 (emphasis added).

In short, the Court has repeatedly stressed that all seizures, other than those of persons held for brief inquiry, must be based upon probable cause. No distinction has been made between the seizure of property and its search, and no case has subject the former to a lesser substantive standard of justification. Rather, the several warrant clause cases concerning automobile and luggage seizures even when seizure and search are undertaken together demonstrate exactly the

opposite conclusion: either search or seizure, or both, are generally supportable only on probable cause.

D. No Categorical Exception To The Generally Applicable Probable Cause Standard Should Be Made For The Detention Of Personal Effects.

In Torres v. Puerto Rico, 442 U.S. 465 (1979), a case conspicuously absent from the Government's brief, this Court flatly rejected Puerto Rico's arguments for a categorical exception to the probable cause requirement for seizure and search of luggage at airports. Puerto Rico had passed a law authorizing the search of any arriving passengers' luggage as a response "to a serious increase in the importation of firearms, explosives, and narcotics from the mainland, and a concomitant rise in crime on the island." 442 U.S. at 466-7. Torres' luggage was seized and searched

at the airport by an officer whose suspicions were aroused by his nervous behavior. 422 U.S. at 467. The Court reversed Torres' conviction despite the argument of the Commonwealth that its law enforcement needs coupled with its special political status and geographic vulnerability required an exception to the Fourth Amendment's probable cause requirement. In language controlling this case the Court held:

> The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found.
>
> * * *
>
> Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment

> prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement. Almeida-Sanchez v. United States [413 U.S. 266] at 273-275 [(1973)]; United States v. Di Re, 332 U.S. 581, 595 (1948).
>
> In any event, Puerto Rico's law enforcement needs are indistinguishable from those of many other states.

442 U.S. at 471, 473-74.

Although the Torres Court did not carefully specify the considerations that guide the Court's determination as to whether to recognize an exception to the probable cause requirement, recent cases make the proper approach clear. As the Government appears to concede (Br. 16), exceptions to the probable cause requirement are never made on an ad hoc basis.[30] Instead, an exception

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30/ As the Court stated in Dunaway, 442 U.S. at 213-14:

> In effect, respondent urges us to adopt a multifactor balancing

(footnote continued on following page)

will be made only on a categorical basis,

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(footnote continued from preceding page)
test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly, defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause. (footnotes omitted).

after considering the justification for the intrusion;[31] the nature and degree of the intrusion; the extent to which an exception might grant law enforcement personnel unbridled discretion;[32] and

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31/ In Michigan v. Summers, 452 U.S. at 698-99, the Court referred to "special enforcement problems" that constitute "substantial law enforcement interests."

32/ Preventing unbridled discretion in law enforcement officers has been a principal concern of this Court's recent Fourth Amendment jurisprudence. See, e.g., Johnson v. United States, 333 U.S. 10, 13-17 (1948); McDonald v. United States, 335 U.S. 451, 455-56 (1948); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Beck v. Ohio, 379 U.S. 89, 97 (1964); See v. Seattle, 387 U.S. 541, 545 (1967); United States v. United States District Court, 407 U.S. 297, 316-17 (1973); Alameida-Sanchez v. United States, 413 U.S. 266, 274 (1973); United States v. Martinez-Fuerte, 428 U.S. 543, 558-66, n.18 (1976); G.M. Leasing Corp. v. United States, 429 U.S. 338, 357 (1977); Marshall v. Barlow's Inc., 436 U.S. 307, 322-24 (1978); Mincey v. Arizona, 437 U.S. 385, 394-95 (1978); Delaware v. Prouse, 440 U.S. 648, 653-55, 661-63 (1979); Brown v. Texas, 443 U.S. 47, 51 (1979); Steagald v. United States, 451 U.S. 204, 220 (1981); and Donovan v. Dewey, 452 U.S. 594, 599-602, 605 (1981).

the danger that the exception "would threaten to swallow the general rule."[33/] See, e.g., Michigan v. Summers, 452 U.S. at 701-05; Dunaway v. New York, 442 U.S. at 210; Delaware v. Prouse, 440 U.S. at 653-54; United States v. Brignoni-Ponce, 422 U.S. at 878; Terry v. Ohio, 392 U.S. at 20-21.

Consideration of these factors, and of previous cases where the Court has considered them, makes plain that no categorical exception to the probable cause requirement is warranted for lengthy seizures of luggage at airports such as occured in this case.

1. Justification for the Intrusion

The justification for the intrusion here is far less weighty than in Terry,

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33/ See, e.g., Dunaway v. New York, 442 U.S. at 213; Michigan v. Summers, 452 U.S. at 697.

Brignoni-Ponce, Mimms or Summers. The interest asserted here is simply the generalized interest in law enforcement, an interest always present in such cases and one which the framers of the Fourth Amendment themselves determined was inadequate to support search or seizure, absent probable cause. Torres v. Puerto Rico, 442 U.S. at 474. Unlike the special risk to the safety of law enforcement officers relied on in Terry, Adams, Mimms and Summers, or the special factors involving border control relied on in Brignoni-Ponce, the United States has not (and could not) point to special law enforcement needs justifying the lengthy seizure here. Indeed, Torres appears dispositively to reject as insufficient the justification for the categorical exception contended for here.[34]

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34/ Although Torres involved both a seizure and search, nothing in the Court's
(footnote continued on following page)

Michigan v. Summers, on which the Government heavily relies, provides it no support. The two justifications pointed to by the Court there are not present here. See generally 452 U.S. at 701-04. First, the Government does not contend, nor could it, that there was a need based on officer safety to seize Mr. Place's luggage. Second, the Court in Summers laid "prime importance" on "the fact that the police had obtained a warrant to search respondent's house for contraband [thereby authorizing] ... a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701, 703. That justification is wholly absent here too.[35/]

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(footnote continued from preceding page) opinion suggests that the Court was prepared to accept a seizure alone on the justification proferred by Puerto Rico. As demonstrated in Points A, B, and C, supra, the history of protection from unreasonable search and seizure would not support such a distinction.

35/ The Summers Court also indicated (footnote continued on following page)

2. The Extent of The Intrusion

As the history canvassed above makes clear, the government's contention that seizure of a person's personal effects absent a search is a minimal intrusion of Fourth Amendment interests is insupportable. The stress that Katz v. United States, 389 U.S. 347 (1967) and subsequent cases laid on the privacy values invaded by searches is not at all inconsistent with the continued understanding, first voiced in Boyd, 116 U.S. at 630, that seizure of an individual's property, when he manifests a legitimate expectation of continued privacy, security, and possession over it, is equally protected. Indeed, Katz expressly so recognized, observing that the Fourth Amendment "protects individual privacy against certain kinds of govern-

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(footnote continued from preceding page) that even the justification present there might give way when the detention was "prolonged". 452 U.S. at 705 n.21.

mental intrusion, but its protections go further and often have nothing to do with privacy at all." 389 U.S. at 350 (emphasis added). The citation provided by the Court for that proposition was to Justice Black's observation, dissenting in Griswold v. Connecticut, that "the average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth." 389 U.S. at 350 n.4.[36/]

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36/ Nor does United States v. Lisk, 522 F.2d 228 (7th Cir. 1975) support the government's view here. Then-Judge Stevens distinguished between the search of a third party's car and the seizure from it of the defendant's property, but the distinction was plainly not intended to suggest that property seizures are generally lesser Fourth Amendment intrusions than property searches. The property whose seizure was upheld in Lisk was seized not from the defendant's hands, but from a car in which he had no expectation of privacy.

Close examination of the consequences of the stop at issue in this case amply demonstrates that, far from being less invasive than the Terry stop, investigative seizure ofproperty directly from an individual's possession as hereis substantially more invasive of Fourth Amendment interests in personal security, mobility, privacy, and possession of one's property than were the stops in Terry and its progeny.

Seizure from a traverl's hand of personal property, such as luggage, does not exist in the abstract; by its nature, it does not supplant, but rather inevitably accompanies, a full-fledged Terry stop. Moreover, the seizure of luggage inflicts anxiety and embarrassment that lasts at least as long as the owner is dispossessed. And, of course, since the owner reasonably believes that the luggage is seized for the purpose of a search, the anxiety is identical to that associated with a search.

These considerations, canvassed by the Court in Delaware v. Prouse, supra, are directly applicable here.

The real extent of the intrusion which the government seeks to justify here, however, reaches far beyond the brief Terry stop and the subjective fear and anxiety of the expected search. More than property is seized. As a practical matter, the individual whose luggage is seized is also seized for the same indeterminate period, or at least detained, as well. Like Mr. Place here, such a person does not know when or where his luggage will be released, and this uncertainty necessarily results in tying up the individual for as long as the detention lasts. A traveler needing luggage or briefcase materials seized, for example, cannot make a connecting flight or train. He may find it useless to travel further to his local destination without his property. Moreover,

unless he chooses to accompany the officers and his luggage, he must make arrangements to pick up his luggage when law enforcement officers decide they are through with it, either at some distant law enforcement facility, or, after waiting uselessly, back at the airport. Frequent telephone communication with law enforcement officers will usually be necessary to make these arrangements. In very real terms, detention of luggage places the person dispossessed on a tether to the seizing officers.[37/]

The Government weakly attempts to deal with one of these concerns, the inconvenience of being dispossessed of one's personal property while traveling, with the fanciful and disingenuous sug-

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37/ If an individual accompanies his luggage to a police facility, or if he is induced to claim the luggage at a law enforcement facility, of course, the factors found dispositive in Dunaway v. New York would come into play.

gestion that owners may remove essential items, such as medicine. (Br. 24) But police officers who suspect the possession of contraband would hardly allow a suspect private access to the container under suspicion, and under Terry such refusal would be amply justified by fear that a weapon would be present or that contraband such as drugs would be removed.

Thus, contrary to the Government's view that the intrusion of the seizure is minimal because travelers "will ordinarily be permitted to remove necessities" from luggage (Br. 24 n.13), the intrusion is severe because the price of access to one's own necessities will be compelled consent to full search of one's luggage, under the joint rubrics of plain view and officer safety.

3. Risk of Excessive Discretion.

Although based on a reasonable suspicion standard similar to the seizures

upheld in Terry, Brignoni-Ponce and Summers, the categorical exception sought here carries substantially higher risk of placing excessive discretion in the hands of law enforcement personnel.[38/] The duration of the seizure is, or can be at the discretion of the officer, much longer than was upheld in Terry or Brignoni-Ponce. Moreover, unlike those stops, this one can be extended geographically. Indeed, by requiring travelers to pick up luggage at police facilities, as would apparently be permissible, the police could accomplish indirectly what was forbidden in Dunaway, namely the physical transfer of a suspect to a police station absent probable cause. Nor is the seizure

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38/ The dangers of excessive discretion inherent in any standard short of probable cause have been noted by this Court. See, e.g., Dunaway, 442 U.S. at 213-14, quoted at n.30, supra; Reid v. Georgia, 448 U.S. 438 (1980).

here accompanied by a magistrate's closely related determination of probable cause, a factor heavily stressed in Summers.

4. The Exception Would Swallow The Rule.

Finally, as amici have shown above, the breadth of the exception contended for here would entirely eviscerate the probable cause requirement for property seizures where a search is not promptly undertaken.

The Government has completely failed to propose a logical limiting principle as to why airport luggage seizures present a "special enforcement problem" constituting "a substantial law enforcement interest" that will not "'threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based upon probable cause.'"[39/]

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39/ Michigan v. Summers, 452 U.S. at 697, citing Dunaway v. New York, 442 U.S. at 213. See also Torres v. Puerto Rico, 442 U.S. at 474.

* * * *

Balancing these factors, the exception sought here is plainly indefensible. It bears on no extraordinary justification, such as officer safety or border control; it is substantially intrusive; it lends itself to excessive discretion of law enforcement personnel unchecked by neutral judgment and narrowly circumscribed rules; and it turns the usual probable cause requirement on its head. All this, for the sole reason that the United States government is assertedly unable to afford a trained dog at one of the nation's busiest airports to assist one of its most enterprising DEA agents.[40/]

If the Government's arguments are accepted, the common experience of passengers who are nervous before and after

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40/ See Br. at 32-33; see also supra at 3-5.

flying may well escalate into the trauma of a luggage seizure simply because a passenger has bought a ticket with cash or is observed looking around a waiting room for a traveling companion or a ride home. The fact is that ambiguous factors constitute reasonable suspicion. For this reason, reasonable suspicion does not amount to probable cause. Although such ambiguous factors may warrant investigation and even a Terry stop, they can hardly be characterized as a "reasonable" basis for the seizure of personal belongings and their forced removal for indefinite periods to unknown places.

The Government's attempt to equate a momentary investigative stop involving a few questions, with or without a frisk, with the indefiniteness and inconvenience of the seizure of luggage in these circumstances is unsupportable. Worry, substitute clothing and toiletries,

forced return to the airport or a police station, and disrupted travel, personal and business plans are the very reasons why the Fourth Amendment forbids unreasonable seizures, that is, seizures lacking probable cause.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

*Petitioner,*

VS.

RAYMOND J. PLACE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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*Article*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA,

*Petitioner,*

VS.

RAYMOND J. PLACE,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Rex E. Lee, Solicitor General of the United States, Counsel for Petitioner, and James D. Clark, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

## INTEREST OF AMICI

**Americans for Effective Law Enforcement, Inc. (AELE),** as a national not-for-profit citizens organization, is interested in

establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-four times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

**The International Association of Chiefs of Police, Inc. (IACP),** is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

**AELE** and **IACP** well know the problems faced by law enforcement officers in their good faith attempts to conduct stops and detentions for investigatory purposes that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to airport confrontations with suspected narcotics couriers, and the severity of the drug trafficking problem, compels these organizations to speak on behalf of law enforcement officers in this case.

## ARGUMENT

### I.

### THE FOURTH AMENDMENT DOES NOT PROHIBIT LAW ENFORCEMENT OFFICERS FROM DETAINING FOR A REASONABLE PERIOD OF TIME PERSONAL LUGGAGE REASONABLY SUSPECTED OF CONTAINING NARCOTICS, FOR THE PURPOSE OF ARRANGING EXPOSURE TO A NARCOTICS DETECTION DOG.

*Amici* will not reiterate at length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address the key legal issues in this case, and point out their importance to the effectiveness of law enforcement nationwide.

The decision of the Second Circuit Court of Appeals is in direct conflict with three different Circuit Courts of Appeals. If allowed to stand it will all but eliminate the good faith efforts of law enforcement agents to conduct effective investigatory stops and investigations at airports, and will all but end the attempts by the federal Government and the states to stem the burgeoning traffic in illegal drugs presently utilizing our commercial air transportation system as its distribution network.

This Court took note of the realities of modern transportation in its relationship to crime in *Carroll* v. *United States*, 267 U. S. 132 (1925), by fashioning a reasonable and common sense exception to the warrant requirement of the Fourth Amendment for motor vehicles. It followed the same approach recently in *United States* v. *Ross*, ____ U. S. ____, 102 S. Ct. 2157, 31 Cr L 3051 (1982), an approach supported by *amici* in that case. In the present case we ask the Court to recognize another reality of modern transportation, i.e., that commercial

air transportation has become the unwitting and unwilling vital link in the movement of illicit drugs into and within this country and that it will be *impossible* for law enforcement agents to have any meaningful impact upon this illegal activity unless they are given reasonable and common sense powers to investigate such crimes.

All three of the Circuit Court cases referred to arose out of Drug Enforcement Agency (DEA) airport confrontations with persons reasonably suspected of carrying narcotics, as in the instant case. In these cases the courts ruled that the federal agents did not violate the Fourth Amendment when temporarily detaining luggage for the purpose of exposure to a narcotics detection dog.

In *United States* v. *Klein*, 626 F. 2d 22 (7th Cir. 1980), DEA agents developed reasonable suspicion that two deplaning passengers were carrying contraband in their suitcases. One of the agents informed the suspects that they were free to leave, but that their suitcases would be detained while the agents attempted to obtain a search warrant. The agents first awaited the arrival of a drug detection dog and then obtained a search warrant after the dog alerted them to the presence of drugs in the luggage. The court ruled that the agents' actions adequately protected the suspects' privacy interest in their luggage and that, given reasonable suspicion, "they would have been remiss in not detaining the bags for further investigation." 626 F. 2d at 26.

The Seventh Circuit in *Klein* relied heavily on this Court's decision in *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970), where it was held that the Fourth Amendment permits the temporary detention of effects for further investigation when police reasonably believe that those effects contain contraband. In *Van Leeuwen*, two packages sent through the United States mails aroused the suspicion of postal officials. The postal officials detained the packages for a day while the

police conducted an investigation. The information obtained during this period was used to obtain a search warrant, and contraband was discovered in the packages.

The First and Ninth Circuits agreed with the Seventh Circuit in *Klein* and applied the principles of *Van Leeuwen* to uphold the validity of temporary detentions of baggage in order to arrange a dog sniff.[1] In *United States* v. *Viegas*, 639 F. 2d 42 (1st Cir. 1981), *cert. denied*, No. 80-1344 (May 4, 1981), DEA agents reasonably suspected that an arriving passenger was carrying drugs in his suitcase. The Court held that the agents' reasonable suspicion justified the temporary detention of the luggage, even though it would inconvenience the defendant. The same court reaffirmed this holding in another case in which luggage was detained on reasonable suspicion pending arrival of a dog, while the suspect was permitted to leave. *United States* v. *West*, 651 F. 2d 71 (1st Cir. 1981).

The Ninth Circuit case is *United States* v. *Martell*, 654 F. 2d 1356 (1981). In that case DEA agents stopped the defendants upon their arrival at the San Diego airport on the basis of a reasonable suspicion that they were carrying contraband. Approximately 20 minutes later, the defendants and the luggage they were carrying were taken to a police office, where a narcotics detection dog gave indication of the presence of narcotics in the luggage. The defendants were detained until a search warrant was obtained and a search of the bags revealed a large quantity of cocaine. The Court of Appeals held that the luggage detention was lawful even if the personal detention of the defendants violated the Fourth Amendment. It stated:

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[1] For a discussion of the abilities and value of such dogs in narcotics detection, see *People* v. *Mayberry*, 644 P. 2d 810, 31 Cr L 2190 (Cal. 1982), and Annotation, Use of Trained Dog to Detect Narcotics Or Drugs As Unreasonable Search in Violation of Fourth Amendment, 31 ALR Fed. 931.

> In our view, * * * *Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a substantially less serious intrusion upon rights of the individual.
>
> * * * * *
>
> We look then to the standard of reasonableness as required by the fourth amendment in the seizure and detention of inanimate objects. 654 F. 2d at 1359.

*Amici* do not deny that the length of time of such a detention has an important bearing on the issue of reasonableness of the investigatory technique chosen by the law enforcement officers. The length of time involved in the instant case compares favorably to *Klein, Viegas,* and *West.* The approximate 90 minute delay in the instant case until the narcotics sniffing dog at Kennedy Airport carried out its assignment was substantially similar to the delays involved in those cases. *Klein* does not indicate the length of the delay; *West* indicates that the bag was held for approximately an hour before the dog arrived; in *Viegas* the agents were informed that no dog would be available for four hours when they decided to detain the bag. It is submitted that there is no sound basis for distinguishing the instant case from the cases upholding a temporary detention of luggage based on reasonable suspicion.

Moreover, there is ample justification for the delay in the instant case. In the absence of a narcotics sniffing dog at LaGuardia Airport the only reasonable course of action for the DEA agents was to take the respondent's luggage to Kennedy Airport for exposure to the dog, not to bring the dog to LaGuardia Airport to await the arrival of the respondent's luggage on the flight from Florida, since to do so would have left Kennedy Airport without the services of the dog. This Court is no doubt aware that international flights hold the greatest potential for the influx of narcotics and that such flights

predominate at Kennedy Airport as compared to LaGuardia Airport. In short, the DEA agents took the only feasible steps they could to apply a reasonable investigatory process to the respondent's bags once they had founded suspicion to believe he was carrying narcotics and they did so within the shortest period of time possible under the circumstances.

*Amici* join with the Government in this case in its concern that law enforcement agents know whether they are permitted to detain a suspect's luggage in order to conduct such an inquiry, or whether they must allow the suspect to leave with his luggage, with the probable result that any contraband contained therein will be delivered successfully or destroyed. In the words of Judge Kaufman in the dissenting opinion, the decision below places an "unwarranted hurdle * * * in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs." 660 F. 2d at 56.

At the same time, however, we also note that the decision below is additionally troublesome in this already complex field of Fourth Amendment law, by erroneously taking the position that the Fourth Amendment draws no distinction between the seizure of a person and the similar seizure of his property. This position is simply not supported by decisions of this Court or any other. This Court has made it clear that the constitutional duration limit of a detention based on reasonable suspicion will vary depending upon the interest invaded by the detention. See, *e.g., Van Leeuwen, supra,* and *Dunaway* v. *New York,* 442 U. S. 200 (1979).

As this Court recognized in *Michigan* v. *Summers,*

> . . . some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in *Dunaway,* the Court was applying the

> ultimate standard of reasonableness embodied in the Fourth Amendment. They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. *But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons* . . .

101 S. Ct. 2587, 2591, 29 Cr L 3097, 3099 (1981) (emphasis added).

We submit that the temporary detention of respondent's luggage was a significantly lesser interference with his individual liberty than a detention of his person would have been, and that a reasonable suspicion should be able to support a detention of *property* for a period of time that actually exceeds the maximum period for which a *person* could be detained under the same circumstances. In this case, the limited inconvenience to respondent of having his luggage detained for approximately 90 minutes was justified by the facts that gave rise to the agents' suspicion that the luggage contained narcotics. We ask the Court to find that the detention was reasonable as a matter of law and fact.

We submit as well, that as to the application of the exclusionary rule in this type of case and, in fact, all others involving the Fourth Amendment, exceptions should also be made for **good faith** mistakes by law enforcement officers, as *amici* have argued in two cases presently pending before this Court, *State of Illinois* v. *Gates*, 88 Ill. App. 3d 1095, 423 N. E. 2d 887 (Ill. 1981), No. 81-430, and *State of Florida* v. *Royer*, 389 So. 2d 1007 (Fla. App. 1979), No. 80-2146.

## CONCLUSION

*Amici* respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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| NO. | TITLE |
|---|---|
| 81-1617-CFY<br>Vide: 81-1835 | United States, Petitioner<br>v.<br>Raymond J. Place |

| DOCKETED | COURT |
|---|---|
| Mar. 1, 1982 | United States Court of Appeals for the Second Circuit |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for Petitioner: Solicitor General |
| | Counsel for Respondent: |
| Jan. 19, 1982 | Application for an extension of time to file petition for writ of certiorari and order granting same until Feb. 28, 1982 by Marshall, J, on Jan. 20, 1982. |
| Mar. 1, 1982 | Petition for writ of certiorari filed. (Record filed). |
| Mar. 22, 1982 | Order extending time to file a response to the petition until Apr. 2, 1982. |
| Mar. 24, 1982 | Order further extending time to file a response to the petition until Apr. 23, 1982. |
| Apr. 26, 1982 | Brief for the respondent in opposition filed. |
| May 12, 1982 | DISTRIBUTED. 5-27. |
| June 1, 1982 | REDISTRIBUTED. 6-3. |
| June 7, 1982 | Petition GRANTED. |
| | --- |
| July 20, 1982 | Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., et al. filed. |
| July 23, 1982 | Order extending time to file the joint appendix and petitioner's brief on the merits until Aug. 21, 1982. |
| Aug. 20, 1982 | Order further extending time to file the joint appendix and the petitioner's brief on the merits until Sept. 7, 1982. |
| Aug. 20, 1982 | Joint appendix for the U.S. filed. |
| Sept. 10, 1982 | Brief for the U. S. filed. |
| Oct. 8, 1982 | Order extending time to file the respondent's brief on the merits until Nov. 15, 1982. |
| Nov. 9, 1982 | Order further extending time to file the respondent's brief on the merits until Nov. 30, 1982. |
| Nov. 18, 1982 | Brief for the American Civil Liberties Union and the New York Civil Liberties Union as amici curiae filed. |
| Dec. 3, 1982 | Brief for respondent Raymond J. Place filed. |
| Dec. 14, 1982 | CIRCULATED. |
| Feb. 22, 1983 | Reply brief for the U. S. filed. (D). |
| March 2, 1983 | ARGUED. |